(17)

No. 97-1732

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, *et al.*,
Petitioners,

v.

PAUL FELZEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

JOINT APPENDIX

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355 pp

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NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages of the printed appendix to the petition for certiorari. They are incorporated herein by reference:

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Opinion of the Court of Appeals	1a

Certificates of service whenever appended to documents appearing herein have been omitted in printing.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
(Chicago)

No. 95-CV-4006

PAUL FELZEN

v.

DWAYNE O. ANDREAS, *et al.*

DOCKET ENTRIES

Date	No.	PROCEEDINGS
7/11/95	1	COMPLAINT; jury demand—Civil cover sheet—Appearance(s) of Robert A. Wallner, Terry Rose Saunders, David J. Bershad and Peter D. Fishbein as attorney(s) for plaintiff with Rule 39 affidavit (no summons(es) issued.) (Documents: 1-1 through 1-4 (mk) [Entry date 07/12/95]
7/11/95	—	RECEIPT regarding payment of filing fee paid; on 7/11/95 in the amount of $120.00, receipt # 458174. (mk) [Entry date 07/12/95] [Edit date 07/12/95] [1:95cv4006]
7/12/95	—	RULE 39 letter mailed to Robert A. Wallner, David J. Bershad and Peter D. Fishbein (mk) [Edit date 07/12/95] [1:95cv4006]
7/26/95	2	VERIFICATION of Paul Flezen [*sic*] regarding complaint [1-1]; Notice of filing by plaintiff (ar) [Entry date 07/28/95] [1:95cv4006]

Date	No.	PROCEEDINGS
8/22/95	3	ATTORNEY APPEARANCE for defendant Archer Daniels Midland Co. by Aubrey M. Daniel III, Nancy F. Lesser, George A. Borden, Timothy Klenk, Richard J. Rappaport, Patricia Klein Smoots, Amy Manning (ar) (a) [Entry date 08/28/95] [1:95cv4006]
8/22/95	4	RULE 39 Affidavit of Aubrey M. Daniel III (ar) [Entry date 08/28/95] [1:95cv4006]
8/22/95	5	RULE 39 Affidavit of Nancy F. Lesser (ar) [Entry date 08/28/95] [1:95cv4006]
8/22/95	6	RULE 39 Affidavit of George A. Borden (ar) [Entry date 08/28/95] [1:95cv4006]
8/22/95	7	RULE 39 Affidavit of Timothy C. Klenk (ar) [Entry date 08/28/95] [1:95cv4006]
8/22/95	8	RULE 39 Affidavit of Richard J. Rappaport (ar) [Entry date 08/28/95] [1:95cv4006]
8/22/95	9	RULE 39 Affidavit of Patricia Klein Smoots (ar) [Entry date 08/28/95] [1:95cv4006]
8/22/95	10	RULE 39 Affidavit of Amy Beth Manning (ar) [Entry date 08/28/95] [1:95cv4006]
8/23/92	11	MOTION by plaintiff Paul Felzen for leave to withdraw appearance; Notice of motion (ar) [Entry date 08/28/95] [1:95cv4006]
8/23/95	12	MINUTE ORDER of 8/23/95 by Hon. Brian Barnett Duff: Denying plaintiff's motion for leave to withdraw appearance [11-1] for the reasons stated on the record. No notice (ar) [Entry date 8/28/95] [1:95cv4006]
8/31/95	13	RESPONSE by plaintiff Paul Felzen in opposition to defendants' motion for transfer; Notice of filing (ar) [Entry date 09/05/95] [1:95cv4006]

Date	No.	PROCEEDINGS
9/11/95	—	SCHEDULE set on 9/11/95 by Hon. Brian Barnett Duff: Status hearing set to 9:30 10/6/95. Mailed notice (ac) [1:95cv4006]
9/13/95	14	MOTION by defendant Archer Daniels Midland Company for an order entering the parties' stipulation extending time to move, answer or otherwise plead; Notice of motion (ar) [Entry date 09/15/95] [1:95cv4006]
9/13/95	15	STIPULATION extending time to move, answer or otherwise plead regarding defendant Archer Daniels Midlang [*sic*] Co.'s motion [14-1] (ar) [Entry date 09/15/95] [1:95cv 4006]
9/14/95	16	MINUTE ORDER of 9/14/95 by Hon. Brian Barnett Duff: Parties' agreed motion to extend time for defendants to answer the complaint [14-1] until 10 days after Judge Ruben Castillo rules on the pending motion for a finding that this action is related to the case of Lawrence v. Archer Daniels Midland Company, 95-C-3579, is granted. Mailed notice (ar) [Entry date 09/15/95] [Edit date 09/15/95] [1:95cv4006]
9/26/95	—	MOTION by Derivative plaintiff for extension of time in which to file proposed consolidated Derivative complaint; Notice of motion (Original in 95 C 3979) (eav) [Entry date 09/28/95] [1:95cv4006]
9/27/95	17	AMENDED MOTION by plaintiff Paul Felzen for leave to withdraw appearance (exhibit); Notice of motion (eav) [Entry date 09/28/95] [1:95cv4006]
9/27/95	18	MINUTE ORDER of 9/27/95 by Hon. Brian Barnett Duff: Status hearing reset for 10/26/95 at 9:30 a.m. Plaintiff's attorneys David J. Bershad and Robert A. Wallner mo-

Date	No.	PROCEEDINGS
		tion for leave to withdraw their appearances as counsel of record is granted. [17-1] Mailed notice (eav) [Entry date 09/28/95] [1:95cv 4006]
9/29/95	—	NOTICE by plaintiffs of proposed consolidated and amended derivative complaint (Exhibit) (Original in 95 C 3979) (Temporarily unavailable for docketing) (eav) [Entry date 10/05/95] [1:95cv4006]
10/4/95	19	MINUTE ORDER of 10/4/95 by Hon. Ruben Castillo: After reviewing the consolidated complaints that were filed in this case; Plaintiff's motion for finding of relatedness 14-1, Defendants' motion for reassignment of case 15-1, and defendants suppiemental motion for reassignment 24-1 are granted. The following cases are hereby reassigned to the calendar of Judge Castillo: 95 C 3980, 95 C 3985, 95 C 4006, 95 C 4028, 95 C 4031, 95 C 4032, 95 C 4036, 95 C 4037, 95 C 4041, 95 C 4091, 95 C 4093, 95 C 4223, 95 C 4234, 95 C 4535, and 95 C 5120. All defendants to answer the consolidated complaints by 10/16/95. Mailed notice (eav) [Entry date 10/05/95] [1:95cv4006]
10/6/95	20	REASSIGNMENT ORDER of 10/05/95: Case reassigned to Hon. Judge Ruben Castillo from Hon. Judge Brian Barnett Duff pursuant to local General Rule 2.31, Case consolidated 1:95-cv-3979 with member cases 1:35-cv-4006 (See reverse of minute order.) Mailed notice (eav) [Entry date 10/10/95] [1:95cv4006]
10/18/95	21	MINUTE ORDER of 10/18/95 by Hon. Ruben Castillo: Plaintiff's motion for extension of time in which the file proposed consolidated complaint [0-1] was previously granted by

Date	No.	PROCEEDINGS
		the court and should therefore be administratively terminated. No notice (eav) [Entry date 10/19/95] [1:95cv4006]
10/24/95	22	RESPONSE by defendant Archer Daniels to plaintiffs' supplemental memorandum; Notice of filing (eav) [Entry date 10/25/95] [1:95 cv4006]
10/24/95	23	MINUTE ORDER of 10/24/95 by Hon. Ruben Castillo: Unopposed motion of plaintiffs Felzen and Esner for leave to file additional appearances is granted. Jules Brody, Joseph H. Weiss and Robert D. Allison are granted leave to file their appearances on behalf of plaintiffs Paul Felzen and Sandra Esner. Mailed notice (eav) [Entry date 10/25/95] [1:95cv4006]
10/24/95	—	UNOPPOSED MOTION by plaintiffs Felzen and Esner for leave to file additional appearances; Notice of motion [Original in 95 C 3979) (eav) [Entry date 10/27/95] [1:95cv 4006]
10/25/95	—	MAILED Rule 3.14 letter to Robert D. Allison (eav) [1:95cv4006]
10/26/95	24	ATTORNEY APPEARANCE for plaintiff Paul Felzen by Jules Brody, Joseph H. Weiss, Robert D. Allison (eav) [Entry date 10/27/95] [1:95cv4006]
10/31/95	25	MEMORANDUM, OPINION, AND ORDER (eav) [Entry date 11/01/95] [1:95cv4006]
10/31/95	26	MINUTE ORDER of 10/31/95 by Hon. Ruben Castillo: Enter memorandum opinion and order. Defendants' motion to transfer this case to the Central District of Illinois is granted. These two cases are transferred to the Central District of Illinois in Danville., terminating case Mailed notice (eav) [Entry date 11/01/95] [1:95cv4006]

Date	No.	PROCEEDINGS
10/31/95	—	MOTION by defendants to dismiss the consolidated and amended derivative complaint or, in the alternative, to stay the action; Notice of filing. (Original in 95 C 3979) (mf) [Entry date 11/01/95] [1:95cv4006]
10/31/95	—	MEMORANDUM by defendants in support of defendants' motion to dismiss [0-1] or stay [0-2] (Attachment); Notice of filing. (Original in 95 C 3979) (mf) [Entry date 11/01/95] [1:95cv4006]
11/2/95	—	AGREED MOTION by defendants for leave to a joint memorandum in excess of 15 pages (Attachments); Notice of motion (Original in 95 C 3979) (eav) [Entry date 11/08/95] [1:95cv4006]
11/15/95	—	CERTIFIED AND TRANSMITTED the complete record to the USDC for the Springfield, Illinois (Danville) consisting of one volume of pleadings, transfer order and certified copy of docket entries, transmittal letter, and certificate, via certified mail no. P 863 997 749: Mailed copy of certificate and transmittal letter to counsel of record. (eav) [1:95cv 4006]
11/20/95	27	RETURN receipt no. P 863 997 749 from Springfield, Il. (eav) [Entry date 11/21/95] [1:95cv4006]
11/21/95	28	MINUTE ORDER of 11/21/95 by Hon. Ruben Castillo: Defendants' motion to dismiss [0-1], defendants' motion for leave to file a joint memorandum in excess of 15 pages [0-1] and defendants' motion to stay the action [0-2] are denied without prejudice. The parties are directed to refile these motions in the Central District of Illinois. No notice (eav) [Entry date 11/24/95] [1:95cv 4006]

Date	No.	PROCEEDINGS
12/1/95	—	MAILED on 12/01/95: Transmittal letter with original minute order of Judge Ruben Castillo, dated 11/21/95, document number 28 to Springfield, Illinois via certified mail no. P 863 997 752. Mailed copy of transmittal letter to counsel of record. (eav) [1:95cv 4006]
12/13/95	29	RETURN receipt no. P 863 997 752 (eav) [1:95cv4006]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
(Urbana)

No. 95-CV-2279

PAUL FELZEN, *et al.*,
Plaintiffs,

v.

DWAYNE O. ANDREAS, *et al.*,
Defendants.

DOCKET ENTRIES

Date	No.	PROCEEDINGS
9/22/95	1	CONSOLIDATED CLASS ACTION COMPLAINT filed (no summons(es) issued) case referred to Mag. Judge David G. Bernthal (case was filed initially 07/10/95 in U.S. Dist Court, Northern District of IL, Chicago) (slj) [Entry date 11/22/95] [Edit date 02/26/96]
11/17/95	—	ORIGINAL FILE, (included doc's 1-26) certified copy of transfer order, (doc #26) and docket sheet received from Northern District of IL. Case referred to Mag. Judge David G. Bernthal (slj) [Entry date 11/22/95]
11/17/95	—	MINUTE-ENTRY: by Judge Harold A. Baker; pursuant to order entered 11/15/95 in the Northern District of IL, Chicago Division, this case has been transferred to the U. S. District Court for the Central District of IL, Urbana Division; previous case number in Northern District of IL 95-4006; new case number in the Urbana Division is 95-2279, all further pleadings are to be filed with the U.S. District Court, 201 S. Vine Street, Urbana, IL 61801 under the new case number 95-2279. (cc: all counsel) (slj) [Entry date 11/22/95]

Date	No.	PROCEEDINGS
12/27/95	2	MOTION by defendants to dismiss the consolidated and amended derivative complaint, or in the alternative to stay the action (slj) [Entry date 12/29/95]
12/27/95	3	MOTION by defendants for leave to file a joint memo in excess of 15 pages (slj) [Entry date 12/29/95]
12/27/95	4	CERTIFICATE OF INTEREST pursuant to Local Rule 1.6 filed by defendant Archer Daniels (slj) [Entry date 12/29/95]
1/3/96	—	ENDORSED ORDER on its face by Mag. Judge David G. Bernthal granting deft' motion for leave to file a joint memo in excess of 15 pages [3-1] (cc: all counsel). (slj)
1/3/96	—	MEMORANDUM IN SUPPORT of defts' motion to dismiss the consolidated and amended derivative complaint [2-1], of motion to stay the action [2-2] by defendants (slj)
1/5/96	9	CERTIFICATE OF INTEREST pursuant to Local Rule 1.6 filed by defendants (kc) [Entry date 01/10/95]
1/5/96	10	MOTION (filed in letter form) by defendant Archer Daniels to withdraw attorney Patricia Klein Smoots, Richard J Rappaport, Timothy C Klenk (kc) [Entry date 01/24/96]
1/10/96	6	MOTION by plaintiff Paul Felzen for leave to file response memo in excess of 15 pages (slj)

Date	No.	PROCEEDINGS
1/10/96	7	MOTION by plaintiff Paul Felzen to extend time to respond to defts' motion to dismiss (slj)
1/10/96	8	ATTORNEY APPEARANCE of Phebus and Glidden for plaintiff Paul Felzen (slj)
1/10/96	—	ENDORSED ORDER on its face by Judge Harold A. Baker granting motion to extend time to respond to defts' motion to dismiss [7-1], granting motion for leave to file response memo in excess of 15 pages [6-1] (cc: all counsel). (kc)
1/10/96	—	MINUTE-ENTRY: by Judge Harold A. Baker; Status hearing set 2:00 p.m. on 2/26/96 by personal appearance in Urbana, IL. Parties should be prepared to discuss alignment of the parties and cases and all pending matters. (cc: all counsel) (kc)
1/10/96	—	ENDORSED ORDER on its face by Judge Harold A. Baker granting motion to withdraw attorney Patricia Klein Smoots, Richard J Rappaport, Timothy C Klenk [10-1] attorney Patricia Klein Smoots for Archer Daniels, (cc: all counsel). (kc) [Entry date 01/24/96]
1/11/96	11	ATTORNEY APPEARANCE by Robert M Roseman, Jeffrey L Kodroff and Jacob A. Goldberg for plaintiff Paul Felzen (kc) [Entry date 01/24/96]
2/2/96	12	MEMORANDUM IN OPPOSITION motion to dismiss the consolidated and amended derivative complaint [2-1], motion to stay the action [2-2] by plaintiff Paul Felzen THIS DOCUMENT IS REPLACED BY NO. 16 FILED 2/26/96 (kc) [Edit date 02/26/96]

Date	No.	PROCEEDINGS
2/13/96	13	MOTION by plaintiff Paul Felzen for leave to file supplemental memo and exhibits in place of previously filed memo (#12) (kc) [Entry date 02/23/96]
2/16/96	14	CERTIFICATE OF INTEREST pursuant to Local Rule 1.6 filed by plaintiff Paul Felzen (kc) [Entry date 02/23/96]
2/16/96	15	ATTORNEY APPEARANCE of Jules Brody for plaintiff Paul Felzen (kc) [Entry date 02/23/96]
2/26/96	—	ENDORSED ORDER on its face by Judge Harold A. Baker granting motion for leave to file supplemental memo and exhibits in place of previously filed memo (#12) [13-1] (cc: all counsel). (kc)
2/26/96	16	MEMORANDUM IN OPPOSITION motion to dismiss the consolidated and amended derivative complaint [2-1], motion to stay the action [2-2] by plaintiff Paul Felzen REPLACES DOCUMENT NO. 12 FILED 2/2/96 (kc)
2/26/96	17	ATTORNEY APPEARANCE for defendant Howard G Buffett by George M. Garvey (kc) [Entry date 03/14/96]
2/26/96	18	MOTION by defendants for leave to file a reply brief in support of defendants' motion to dismiss or stay (kc) [Entry date 03/14/96]
2/26/96	—	MINUTE-ENTRY: by Judge Harold A. Baker; Status hearing held 2:00 2/26/96 Appearances: Terry Rose Saunders, Robert Allison, Joseph Phebus and Fred Isquith for pltfs; James Shafter, Aubrey Daniel for dft ADM; Thom Moss for individual defts; George Garvey for dft Buffett. Statement of the case by

Date	No.	PROCEEDINGS
		counsel. It is represented that this is a consolidated case that was transferred from the Northern District of Illinois (No. 95-4006 Felzen; 95-4041 Gaulich; and 95-4535 Esner). Prior to transfer 95-4041 (Gaulich) was dismissed without prejudice. The Clerk is directed to align the parties appropriately in accordance with counsel's representations. The parties agree that Joseph Phebus and Terry Rose Saunders are designated laison counsel for plaintiffs to receive all notices and distribute. James Shafter, Thom Moss and George Garvey are designated laison counsel for defts to receive and distribute notices. Motion for leave to file reply brief allowed. Reply brief on file. Parties represent the motion to dismiss or stay is fully briefed and the court sets for hearing the motion to dismiss the consolidated and amended derivative complaint or in the alternative to stay [2-1] at 1:30 4/26/96 by personal appearance in Urbana, IL. See Case Management Order # 1. (cc: designated counsel) (kc) [Entry date 03/14/96]
2/26/96	—	ENDORSED ORDER on its face by Judge Harold A. Baker granting motion for leave to file a reply brief in support of defendants' motion to dismiss or stay [18-1] (cc: designated counsel). (kc) [Entry date 03/14/96]
2/26/96	19	REPLY by defendants to response to motion to dismiss the consolidated and amended derivative complaint [2-1], motion to stay the action [2-2] (kc) [Entry date 03/14/96]
3/6/96	20	CASE MANAGEMENT ORDER NO. 1 by Judge Harold A. Baker (cc: designated counsel) (kc) [Entry date 03/14/96]

Date	No.	PROCEEDINGS
3/29/96	21	MOTION by defendants for protective order (kc) [Entry date 04/22/96]
3/29/96	22	MOTION by defendants for oral argument on defendants' motion for a protective order and for advancement of oral argument on defendants' motion to dismiss (kc) [Entry date 04/22/96]
3/29/96	23	MEMORANDUM IN SUPPORT of motion for oral argument on defendants' motion for a protective order and for advancement of oral argument on defendants' motion to dismiss [22-1] by defendants (kc) [Entry date 04/22/96]
4/11/96	24	MOTION by plaintiff for leave to file surreply in opposition to defendants' motion to dismiss or stay (kc) [Entry date 04/22/96]
4/15/96	25	RESPONSE by plaintiffs to motion for oral argument on defendants' motion for a protective order and for advancement of oral argument on defendants' motion to dismiss [22-1] (kc) [Entry date 04/2/96]
4/15/96	26	MEMORANDUM IN OPPOSITION motion for oral argument on defendants' motion for a protective order and for advancement of oral argument on defendants' motion to dismiss [22-1] by plaintiffs (kc) [Entry date 04/22/96]
4/22/96	—	ENDORSED ORDER on its face by Judge Harold A. Baker allowing motion for leave to file surreply in opposition to defendants' motion to dismiss or stay (kc)
4/22/96	27	SURREPLY by plaintiffs to opposition to motion to dismiss the consolidated and amended derivative complaint [2-1], motion to stay the action [2-2] (kc)

Date	No.	PROCEEDINGS
4/26/96	—	MINUTE-ENTRY: by Judge Harold A. Baker Appearances: Terry Rose Saunders and Robert Roseman for pltfs; James Shafter, Aubrey Daniel, Nancy Lessr and George Borden for dft ADM; Thom Moss for individual dfts and George Garvey for dft Buffett Arguments heard on motion to dismiss. Court grants motion to dismiss the consolidated and amended derivative complaint (which the court does not have in the official court file) [2-1], pltf given 21 days to replead. Dfts to resp within 21 days thereafter. (cc: Phebus, Saunders, Shafter, Moss & Garvey) (kc) [Entry date 05/29/96]
5/17/96	28	AMENDED COMPLAINT by plaintiff Paul Felzen, plaintiff Sandra Esner; jury demand; adding Ray A Goldberg, John K Vanier, Shreve M Archer Jr, F Ross Johnson, M Brian Mulroney, Robert S. Strauss, and Margaretta Rockefeller (kc) [Entry date 05/29/96]
6/7/96	29	MOTION by defendant to dismiss the consolidated and amended derivative complaint for failure to make demand and failure to state a claim (kc) [Entry date 06/12/96]
6/7/96	30	MOTION by defendants for leave to file joint memorandum in excess of fifteen pages (kc) [Entry date 06/12/96]
6/12/96	—	ENDORSED ORDER on its face by Judge Harold A. Baker granting motion for leave to file joint memorandum in excess of fifteen pages [30-1] (cc: all counsel). (kc)
6/12/96	31	MEMORANDUM IN SUPPORT of motion to dismiss the consolidated and amended derivative complaint for failure to make demand and failure to state a claim [29-1] by defendants (kc)

Date	No.	PROCEEDINGS
6/18/96	32	MOTION by plaintiffs for leave to file brief in excess of 15 pages, and to extend time to file the same (slj) [Entry date 07/08/96]
7/9/96	—	ENDORSED ORDER on its face by Mag. Judge David G. Bernthal granting motion for leave to file brief in excess of 15 pages [32-1], granting motion to extend time to file the same [32-2] (cc: all counsel). (slj)
7/10/96	33	MOTION by plaintiffs to compel discovery (slj)
7/10/96	34	MEMORANDUM IN SUPPORT of motion to compel discovery [33-1] by plaintiffs (slj)
7/10/96	35	MEMORANDUM IN OPPOSITION motion to dismiss the consolidated and amended derivative complaint for failure to make demand and failure to state a claim [29-1] by plaintiffs (slj)
7/10/96	36	CERTIFICATE of service re doc's #33-35 by plaintiffs (slj)
7/19/96	37	MEMORANDUM IN OPPOSITION motion to compel discovery [33-1] by defendant Archer Daniels (mt)
8/13/96	38	MOTION by defendants, for leave to file reply brief in support of defendants' motion to dismiss (kc) [Entry date 09/04/96]
9/4/96	—	ENDORSED ORDER on its face by Judge Harold A. Baker granting motion for leave to file reply brief in support of defendants' motion to dismiss [38-1] (cc: all counsel). (kc)
9/4/96	39	REPLY by defendant, plaintiff, defendant to response to motion to dismiss the consolidated and amended derivative complaint for failure to make demand and failure to state a claim [29-1] (kc)

Date	No.	PROCEEDINGS
9/4/96	—	MINUTE-ENTRY: by Judge Harold A. Baker setting motion to compel discovery [33-1] at 1:30 9/26/96, setting motion to dismiss the consolidated and amended derivative complaint for failure to make demand and failure to state a claim [29-1] at 1:30 9/26/96. The Court finds the defendants' motion for a protective order and for advancement of oral argument on defendants' motion to dismiss [22-1] moot due to the filing of the amended complaint. (cc: designated counsel) (kc)
9/24/96	40	JOINT MOTION by plaintiffs and defendants to continue hearing set 9/26/96 (mt)
9/25/96	—	MINUTE-ENTRY: by Judge Harold A. Baker granting motion to continue hearing set 9/26/96 [40-1], re motion to compel discovery [33-1], re motion to dismiss the consolidated and amended derivative complaint for failure to make demand and failure to state a claim [29-1]. Hearing set 9/26/96 is VACATED and will be reset. Atty Peckert is directed to notify all parties. (mt)
10/10/96	—	MINUTE-ENTRY: by Judge Harold A. Baker setting motion to compel discovery [33-1] at 1:30 11/8/96, setting motion to dismiss the consolidated and amended derivative complaint for failure to make demand and failure to state a claim [29-1] at 1:30 11/8/96 by personal appearance in Urbana. (cc: attys Joseph Phebus, Terry Rose Saunders, James Shafter, Thom Moss, George Garvey) (mt)
10/22/96	41	MOTION by plaintiff Paul Felzen for leave to file reply in support of motion to compel discovery (mt)
10/24/96	—	ENDORSED ORDER on its face by Judge Harold A. Baker granting motion for leave to

Date	No.	PROCEEDINGS
		file reply in support of motion to compel discovery [41-1] (cc: all counsel). (mt)
10/24/96	42	REPLY by plaintiff Paul Felzen, plaintiff Sandra Esner to response to motion to compel discovery [33-1] (mt)
10/31/96	—	MINUTE-ENTRY: by Judge Harold A. Baker VACATING motion hearing 11/8/96 and RESETTING motion to compel discovery [33-1] at 1:30 12/11/96, RESETTING motion to dismiss the consolidated and amended derivative complaint for failure to make demand and failure to state a claim [29-1] at 1:30 12/11/96 by personal appearance in Urbana. (cc: attys Phebus, Saunders, Shafter, Moss & Garvey (slj) [Edit date 10/31/96]
11/4/96	43	MOTION by plaintiff Paul Felzen, plaintiff Sandra Esner for leave to file supplement to consolidated and amended derivative complaint (sj) [Entry date 11/06/96]
11/4/96	44	MEMORANDUM IN SUPPORT of motion for leave to file supplement to consolidated and amended derivative complaint [43-1] by plaintiff Paul Felzen, plaintiff Sandra Esner (sj) [Entry date 11/06/96]
11/18/96	—	ENDORSED ORDER on its face by Judge Harold A. Baker granting pltfs' motion for leave to file supplement to consolidated and amended derivative complaint [43-1] (cc: all counsel). (sj)
11/18/96	45	MOTION by dfts Dwayne O Andreas, Ralph Bruce, John H Daniels, Howard G Buffett, Lowell W Andreas, James R Randall, Michael D Andreas, H D Hale, O Glenn Webb, Martin L Andreas, Archer Daniels, Ray A Goldberg, John K Vanier, Shreve M Archer Jr, F Ross

Date	No.	PROCEEDINGS
		Johnson, M Brian Mulroney, Robert S Strauss, Margaretta Rockefeller for protective order (sj) [Entry date 11/19/96]
11/18/96	46	MEMORANDUM IN SUPPORT of motion for protective order [45-1] by dfts Dwayne O Andreas, Ralph Bruce, John H Daniels, Howard G Buffett, Lowell W Andreas, James R Randall, Michael D Andreas, H D Hale, O Glenn Webb, Martin L Andreas, Archer Daniels, Ray A Goldberg, John K Vanier, Shreve M Archer Jr, F Ross Johnson, M Brian Mulroney, Robert S Strauss, Margaretta Rockefeller (sj) [Entry date 11/19/96]
11/18/96	47	CERTIFICATE of service re mtn for protective order (#45) and supporting memo (#46) by defendants (sj) [Entry date 11/19/96]
11/18/96	43	AMENDMENT (SUPPLEMENT) by plaintiff Paul Felzen, plaintiff Sandra Esner to consolidated and amended derivative complaint [28-1] (attached as Exhibit A to mtn #43) (sj) [Entry date 01/02/97]
12/2/96	48	RESPONSE by plaintiff Paul Felzen, plaintiff Sandra Esner to motion for protective order [45-1 (sj) [Entry date 12/03/96]
12/6/96	49	MOTION by plaintiff Paul Felzen for leave to amend and supplement their consolidated & amended derivative complaint (slj)
12/6/96	50	MEMORANDUM IN SUPPORT of motion for leave to amend and supplement their consolidated & amended derivative complaint [49-1] by plaintiff Paul Felzen (slj)
12/10/96	—	MINUTE-ENTRY: conf call held by Judge Harold A. Baker with appearance of attys Roseman, Shafter, Daniel and Borden. Oral

Date	No.	PROCEEDINGS
		mtn to continue hrg set for 12/11/96 made by all parties; mtn allowed. Motion to dismiss the consolidated and amended derivative complaint for failure to make demand and failure to state a claim [29-1] and motion to compel discovery [33-1] RESET to 1:30 1/21/97 by personal appearance in Urbana, IL. (sj) [Entry date 12/11/96]
12/23/96	—	MINUTE-ENTRY: by Judge Harold A. Baker. Motion hearing set 1/21/97 is VACATED AND RESET at 1:30 1/21/97 by personal appearance in Urbana re motion for leave to amend and supplement their consolidated & amended derivative complaint [49-1]; motion for protective order [45-1]; motion to compel discovery [33-1]; motion to dismiss the consolidated and amended derivative complaint for failure to make demand and failure to state a claim [29-1]. (cc: all counsel) (mt)
12/27/96	—	ENDORSED ORDER on its face by Judge Harold A. Baker granting motion for leave to amend and supplement their consolidated & amended derivative complaint [49-1] (cc: all counsel). (mt)
12/27/96	49	AMENDMENT AND SUPPLEMENT by plaintiff Paul Felzen, plaintiff Sandra Esner to consolidated and amended derivative complaint [28-1], [43-1] (attached as Exhibit A to document #49) (sj) [Entry date 01/02/97]
1/23/97	—	MINUTE-ENTRY: by Judge Harold A. Baker; By agreement of parties the motion hearing 1/31/97 is VACATED AND RESET AT 1:30 2/26/97. Resetting motion for protective order [45-1]; motion to compel discovery [33-1] and motion to dismiss the consolidated and amended derivative complaint

Date	No.	PROCEEDINGS
		for failure to make demand and failure to state a claim [29-1] at 1:30 2/26/97 (cc: all counsel) (slj)
2/5/97	51	MOTION by defendant Archer Daniels for leave to file to file joint supplemental memorandum in support of the pending motion to dismiss pla's derivative complaint (kw)
2/5/97	52	CERTIFICATE of service by defendant Archer Daniels (kw)
2/7/97	—	ENDOSED ORDER on its face by Judge Harold A. Baker granting dfts' motion for leave to file to file [*sic*] joint supplemental memorandum in support of the pending motion to dismiss pla's derivative complaint [51-1] (cc: Joseph Phebus, Terry Rose Saunders, James Shafter, Thom Moss and George Garvey as agreed per docket entry dated 2/26/96) (sj) [Edit date 02/07/97]
2/7/97	53	SUPPLEMENTAL MEMORANDUM IN SUPPORT of motion to dismiss the consolidated and amended derivative complaint for failure to make demand and failure to state a claim [29-1] by defendants (sj)
2/14/97	—	MINUTE-ENTRY: by Judge Harold A. Baker; by agreement of parties, motion hearing set 2/26/97 is vacated; RESETTING motion for protective order [45-1], motion to compel discovery [33-1], and motion to dismiss the consolidated and amended derivative complaint for failure to make demand and failure to state a claim [29-1] at 1:30 3/26/97 by personal appearance in Urbana. Parties to advise the court at the earliest opportunity whether the 3/26/97 hearing will be a status hearing or a motion hearing; if it will be a motion hearing, the date may need to be re-

Date	No.	PROCEEDINGS
		scheduled to allow adequate time. (cc: designated counsel) (sj)
2/18/97	54	MOTION by plaintiff Paul Felzen, plaintiff Sandra Esner to extend time to file response to dfts' supplemental memo in support of mtn to dismiss pltfs' derivative complaint (sj) [Entry date 02/20/97]
3/4/97	—	ENDORSED ORDER on its face by Judge Harold A. Baker; response to dfts' supplemental memorandum is support of mtn to dismiss pltfs' derivative cmp [53-1] is due by 3/7/97. (cc: designated counsel) (sj) [Edit date 03/04/97]
3/6/97	55	AGREED MOTION by plaintiffs and defendants to extend time for pltfs to respond to dfts' supplemental memo in support of pending mtn to dismiss pltfs' derivative complaint until 3/26/97 (sj)
3/6/97	56	ORDER by Mag. Judge David G. Bernthal granting agreed motion to extend time for pltfs to respond to dfts' supplemental memo in support of pending mtn to dismiss pltfs' derivative complaint until 3/26/97 [55-1] ; response to memorandum [53-1] due 3/26/97. (cc: designated counsel) (sj)
3/26/97	—	MINUTE-ENTRY: by Judge Harold A. Baker VACATING mtn hrg set for 3/26/97 and RESETTING motion for protective order [45-1] at 2:30 4/4/97, motion to compel discovery [33-1] at 2:30 4/4/97, motion to dismiss the consolidated and amended derivative complaint for failure to make demand and failure to state a claim [29-1] at 2:30 4/4/97 by personal appearance in Urbana. Atty Peckert to give notice. (sj)

Date	No.	PROCEEDINGS
3/26/97	57	AGREED MOTION by plaintiffs and defendants to extend time for the filing of pltfs' response to dfts' supplemental memo in support of pending mtn to dismiss pltfs' derivative complaint (sj)
3/27/97	58	ORDER by Judge Harold A. Baker granting motion to extend time for the filing of pltfs' response to dfts' supplemental memo in support of pending mtn to dismiss pltfs' derivative complaint [57-1]; response ddl to memorandum [53-1] extended to 4/4/97 (cc: designated counsel) (sj) [Edit date 03/27/97]
3/27/97	59	Notice of hearing filed by dft ADM; status hearing set 2:30 4/4/97 before Judge Harold A. Baker in Urbana, IL. (sj)
4/4/97	—	MINUTE-ENTRY: by Judge Harold A. Baker; Rule 16 hearing held in chambers 2:30 4/4/97—app of pltfs by Robert Roseman and Terry Rose Saunders, app of individual dfts by Thom Moss, app of dft ADM by James Shafter. Status of case discussed; Rule 16 conference set 1:30 4/25/97 by conf call. Hearing set 7/7/97 on all pending matters; setting motion for protective order [45-1] at 9:00 7/7/97, setting motion to compel discovery [33-1] at 9:00 7/7/97, setting motion to dismiss the consolidated and amended derivative complaint for failure to make demand and failure to state a claim [29-1] at 9:00 7/7/97 by personal appearance in Urbana, IL. All matters stayed until the 7/7/97 hearing. (sj) [Entry date 04/07/97]
4/25/97	—	MINUTE-ENTRY: by Judge Harold A. Baker; Rule 16 conference held 1:30 4/25/97. Apr of pltf thru Terry Rose Saunders, apr of individual defts thru Thom Moss and apr of ADM thru James Shafter. Status discussed. No further hrgs set. (slj)

Date	No.	PROCEEDINGS
5/28/97	—	MINUTE-ENTRY: by Judge Harold A. Baker; at request of atty Shafter, conference call held with attorneys Terry Rose Saunders and James Shafter. Parties working on a proposed notice that they propose to mail out on 5/30/97 if they can get the court's approval. Telephone conference call set 10:30 5/30/97; atty Shafter to set up the call and notify parties and the court what telephone number to call into.
5/30/97	60	AGREED MOTION by plaintiff Paul Felzen, plaintiff Sandra Esner for order preliminarily approving settlement, scheduling a final settlement hearing and directing that notice be given to the shareholders of ADM Co. (sj) [Entry date 06/03/97]
5/30/97	61	MEMORANDUM IN SUPPORT of agreed motion for order preliminarily approving settlement, scheduling a final settlement hearing and directing that notice be given to the shareholders of ADM Co. [60-1] by plaintiff Paul Felzen, plaintiff Sandra Esner (sj) [Entry date 06/03/97]
5/30/97	—	MINUTE-ENTRY: by Judge Harold A. Baker; status hearing held by conf call 10:30 5/30/97—app of pltfs by Terry Rose Saunders; app of dfts by James Shafter, George Borden, James Peckert, Thom Moss; app of Delaware pltfs by Susan Salvetti, Mel Lifshitz, Jeffrey Haber. Statement by the court as to order; written order to be entered this date. (sj) [Entry date 06/03/97]
5/30/97	62	ORDER by Judge Harold A. Baker granting agreed motion for order preliminarily approving settlement, scheduling a final settlement hearing and directing that notice be given to the shareholders of ADM Co. [60-1];

Date	No.	PROCEEDINGS
		settlement hearing set 9:30 7/7/97 at the U.S. Courthouse in Urbana, IL to determine whether the proposed settlement of the derivative claims on the terms and conditions provided in the Stipulation is fair, reasonable and adequate and should be approved by the court; whether a judgment, as provided in the stipulation should be entered herein and to determine whether pltfs' counsels' fees and expenses should be approved. See written order, (cc: designated counsel; copy faxed to attys Haber, Saunders, Shafter and Moss) (sj) [Entry date 06/04/97]
6/13/97	63	OBJECTIONS by objector Charles W Pauly Jr, objector Elizabeth Pauly to proposed settlement of derivative actions (sj) [Entry date 06/16/97]
6/23/97	65	OBJECTIONS by objector Peter D Scott to motion for order preliminarily approving settlement, scheduling a final settlement hearing and directing that notice be given to the shareholders of ADM Co. [60-1] (slj) [Entry date 06/30/97]
6/26/97	64	OBJECTIONS by objector Mitchell Berns to award of excessive attorneys' fees (kw) [Entry date 06/27/97]
6/26/97	66	OBJECTIONS by objector John P Chiara to motion for order preliminarily approving settlement, scheduling a final settlement hearing and directing that notice be given to the shareholders of ADM Co. [60-1] (slj) [Entry date 06/30/97]
6/30/97	67	AFFIDAVIT of Susan Salvetti in support of the proposed settlement and the petition of Delaware Pltfs' Counsel for Attys' fees and reimbursement of expenses. [60-1] (slj)

Date	No.	PROCEEDINGS
6/30/97	68	MEMORANDUM IN SUPPORT of of proosed [*sic*] settlement and award of fees and expenses [60-1] by miscellaneous Delaware Plaintiffs (slj)
6/30/97	69	APPENDIX filed by miscellaneous Delaware Plaintiffs re affidavit [67-1] (slj)
6/30/97	70	NOTICE of filing and service re doc's 68 & 69 by miscellaneous Delaware Plaintiffs (slj)
6/30/97	71	MOTION by plaintiffs for final approval of the proposed settlement and pltfs' counsel's joint application for an award of attys' fees and reimbursement of expenses (slj)
6/30/97	72	AFFIDAVIT of Terry Rose Saunders and Robert M. Roseman in support of the proposed settlement and pltfs' counsel's joint application for an award of attys' fees and reimbursement of expenses [71-1] (slj)
6/30/97	73	MEMORANDUM IN SUPPORT of joint application for an award of attys' fees and reimbursement of expenses [71-1] (slj)
6/30/97	74	APPENDIX filed by plaintiff in support of the proposed settlement and pltfs' counsel's joint application for an award of attys' fees and reimbursement of expenses [71-1] (slj)
6/30/97	75	MEMORANDUM IN SUPPORT of the proposed settlement by plaintiff Paul Felzen, plaintiff Sandra Esner (slj)
6/30/97	76	CERTIFICATE of service re doc's 71-75 by plaintiffs (slj)
7/1/97	77	MOTION by defendant Archer Daniels for leave to file memo exceeding page limitation (mb)
7/2/97	—	ENDORSED ORDER on its face by Judge Harold A. Baker granting motion for leave

Date	No.	PROCEEDINGS
		to file memo exceeding page limitation [77-1] (cc: all counsel). (slj)
7/2/97	78	MEMORANDUM IN SUPPORT of settlement by defendant Archer Daniels (slj)
7/2/97	79	AFFIDAVIT of Michael P. Dooley in support of Settlement with attached exhibits (slj)
7/3/97	80	OBJECTIONS by objector CA Public Employees, objector FL State Board to proposed settlement of derivative actions (slj)
7/3/97	81	DECLARATION of Ann L. Yerger re proposed settlement (slj)
7/3/97	82	DECLARATION of Steven F. Benz (slj)
7/3/97	83	DECLARATION of Sarah A.B. Teslik re proposed settlement (slj)
7/7/97	84	SUPPLEMENT by objector Mitchell Berns to objection of Mitchell Berns to award of excessive attys' fees [64-1] (slj)
7/7/97	85	ATTORNEY APPEARANCE by Michael Dockterman for defendant O Glenn Webb (mt) [Entry date 07/08/97]
7/7/97	86	AFFIDAVIT of Christine Ferguson regarding mailing of notice of hearing on proposed settlement of derivative actions and errata (mt) [Entry date 07/08/97]
7/7/97	87	AFFIDAVIT of John C. Coffee, Jr. to supplement earlier affidavit dated 6/25/97 (mt) [Entry date 07/08/97]
7/7/97	88	AFFIDAVIT of Robert M. Roseman in opposition to objectors' motion to postpone the settlement hearing (mt) [Entry date 07/08/97]
7/7/97	89	SUPPLEMENTAL AFFIDAVIT of C. Oliver Burt, III (mt) [Entry date 07/08/97]

Date	No.	PROCEEDINGS
7/7/97	—	MINUTE-ENTRY: by Judge Harold A. Baker re motion for final approval of the proposed settlement and pltfs' counsel's joint application for an award of attys' fees and reimbursement of expenses [71-1], re motion for protective order [45-1], re motion to compel discovery [33-1], re motion to dismiss the consolidated and amended derivative complaint for failure to make demand and failure to state a claim [29-1]. Mtn hrg held 7/7/97. Appearances as follows: Joseph Phebus/Robert Roseman/Terry Rose Saunders for Illinois pltfs; Stanley Bernstein/Susan Salvetti/Robert Harwood for Delaware pltfs; Thom Moss for individual dfts; Michael Dockterman for individual dft Webb; James Peckert/A. James Shafter for dft ADM; objectors: Mark Hansen for objectors California Public Employees' Retirement System and Florida State Board of Administration; Tom Beenck for Florida State Board Administration; objector Miller; Martin Glotzer (non-atty) representing 25% of shareholders. Mtn by objectors to postpone hearing on settlement; arguments hrd; crt concludes due process was afforded; mtn denied. Arguments heard on settlement; court concludes settlement is fair and reasonable and adequate. Crt waives page limitation on filing by Florida State Board (#88). Arguments heard on atty fees. Crt concludes gross fees 49% of settlement fund: $3,920,000 awarded including expenses. 60% to Illinois pltfs attys $2,253,000; 40% to Delaware pltfs attys $1,568,000. Final judgment order of dismissal entered. Order awarding fees entered. See written orders. (mt) [Entry date 07/08/97]

Date	No.	PROCEEDINGS
7/7/97	90	ORDER by Judge Harold A. Baker granting motion for final approval of the proposed settlement and pltfs' counsel's joint application for an award of attys' fees and reimbursement of expenses [71-1]. The court hereby approves the settlement set forth in the stipulation and finds the settlement is, in all respects, fair, reasonable and adequate; the crt hereby dismisses this action against the company w/prej and w/out costs; the crt retains jurisdiction over the settlement. See written order. Case terminated. (cc: all counsel) (mt) [Entry date 07/08/97]
7/7/97	91	ORDER AWARDING ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES by Judge Harold A. Baker. The crt awards gross fees and expenses to pltfs attys in amt of 49 percent of the settlement proceeds ($3,920,000). These fees and expenses shall be divided 60 percent to the federal action or $2,352,000 and 40 percent or $1,568,000 to the Delaware actions. See written order. (cc: all counsel) (mt) [Entry date 07/08/97]
7/7/97	92	EXHIBIT No. 1 for fairness hrg (letter by Kehart, Shafter & Webber) for plaintiff Paul Felzen stored in file 95-2279 (mt) [Entry date 07/08/97]
7/8/97	93	JUDGMENT in a civil case entered. Case dismissed w/ prej as compromised. (cc: all counsel) (mt)
7/15/97	94	NOTICE of APPEAL by objector CA Publi. Employees, objector FL State Board from Dist. Court decision, [90], [91], [93] (cc: designated counsel and counsel for objectors and misc parties) (sj) [Entry date 07/16/97] [Edit date 07/16/97]

Date	No.	PROCEEDINGS
7/15/97	95	JURISDICTIONAL DOCKETING STATEMENT filed by objector CA Public Employees, objector FL State Board (sj) [Entry date 07/16/97]
7/15/97	96	Received appeal fee in amount of $105.00 (Receipt # 032269) (sj) [Entry date 07/16/97]
7/16/97	97	SHORT RECORD ON APPEAL sent to USCA (sj)
7/21/97	98	DESIGNATION OF RECORD by objector CA Public Employees, objector FL State Board (sj)
7/21/97	99	Request by objector CA Public Employees, objector FL State Board for transcript (pink copy of SEVENTH CIRCUIT TRANSCRIPT INFORMATION SHEET) (sj)
7/23/97	100	RESPONSE (filed as REPLY) by objector Charles W Pauly Jr, objector Elizabeth Pauly to motion for final approval of the proposed settlement and pltfs' counsel's joint application for an award of attys' fees and reimbursement of expenses [71-1] (sj)
7/28/97	101	Notification by USCA of Appellate Docket Number 97-2829 (sj)
7/29/97	102	MOTION by objector CA Public Employees, objector FL State Board to withdraw the record on appeal (sj)
8/1/97	103	TRANSCRIPT of Fairness Hearing held 7/7/97 before Judge Harold A. Baker filed by Toni Judd, U.S. Court Reporter (sj)
8/5/97	104	ORDER by Mag. Judge David G. Bernthal granting motion to withdraw the record [102-1] (cc: all counsel) (slj)

Date	No.	PROCEEDINGS
8/5/97	105	Remark-Appeal record consisting of 2 volumes of pleadings, 1 transcript and 6 loose pleadings mailed to LAW FIRM OF KELLOGG HUBER, Washnigton, DC. (slj)
8/21/97	106	COPY of USCA Order directing Appellant California Public Employees Retirement System and Florida State Board of Administration to file a response to pltfs' motion to dismiss the appeal of non-parties, filed on 8/14/97. (slj)
9/4/97	107	Remark—appeal record consisting of 2 volumes of pleadings, 1 transcript and 6 loose pleadings returned from law firm of KELLOGG HUBER HANSEN TODD & EVANS in Washington, DC (sj)
2/17/98	108	MANDATE from USCA dismissing the appeal [94-1] for want of jurisdiction, with costs, in acocrdance with the decision of that court entered by that court on 1/21/98 (sj)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 97-2829

PAUL FELZEN,
Trustee of Louise Laskin Trust—1991,
and SANDRA ESNER,
Plaintiffs-Appellees,

v.

ARCHER DANIELS MIDLAND COMPANY,
a Delaware Corporation,
Defendant.

Appeal of: California Public Employees
Retirement System and Florida
State Board of Administration

DOCKET ENTRIES

Date	PROCEEDINGS
7/21/97	Private civil case docketed. [97-2829] [969479-1] Transcript information sheet due 7/31/97. Appellant's brief due 9/2/97 for CA Public Employees, for FL State Bd of Admin. (dorh)
7/21/97	Filed Appellant CA Public Employees, Appellant FL State Bd of Admin docketing statement. [97-2829] [969516-1] (dorh)
7/31/97	Certificate of interest filed by Appellant CA Public Employees, Appellant FL State Bd of Admin. [97-2829] [969479-1] (jenp)

Date	PROCEEDINGS
8/1/97	Certificate of interest filed by Appellee Paul Felzen, Appellee Sandra Esner. [97-2829] [969479-1] (jenp)
8/8/97	Certificate of interest filed by Archer-Daniels-Midla [*sic*]. [97-2829] [969479-1] (jenp)
8/8/97	Added attorney A. James Shafter per appearance form. Appearance form filed for Archer-Daniels-Midla [*sic*] by attorney A. James Shafter, James E. Peckert. [97-2829] [969479-1] (jenp)
8/13/97	Certificate of interest filed by defendants-appellees, Dwayne and Michael Adreas, et al., (Notice-Only). [97-2829] [969479-1] (jenp)
8/15/97	Filed motion by Appellees Paul Felzen and Sandra Esner to dismiss appeal of non-parties. [978129-1] [97-2829] (heid)
8/18/97	ORDER: Filed clerk's notice to Appellant CA Public Employees, Appellant FL State Bd of Admin to file a response to PLAINTIFFS' MOTION TO DISMISS THE APPEAL OF NON-PARTIES. [978129-1] MAF [97-2829] [978412-1] Briefing is SUSPENDED pending resolution of the motion. (See order for further details) Response due 8/29/97 for FL State Bd of Admin, for CA Public Employees. (patb)
8/29/97	Filed Appellants CA Public Employees and FL State Bd of Admin Memorandum In Opposition to plaintiffs' motion to dismiss case. [982755-1] [97-2829] [982755-1] (heid)
9/4/97	ORDER: Filed clerk's notice to Plaintiffs Paul Felzen and Sandra Esner to file a response to MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO DISMISS. [978129-1] MAF [97-2829] Response due 9/17/97 for Sandra Esner, for Paul Felzen. Briefing remains DEFERRED pending resolution of the motion to dismiss. (heid)

Date	PROCEEDINGS
9/17/97	Filed Appellees Paul Felzen and Sandra Esner Reply Memorandum In Support of motion to dismiss case. [989012-1] [97-2829] [989012-1] (heid)
1/21/98	Filed opinion of the court by Judge Easterbrook. This appeal is DISMISSED for want of jurisdiction. (This opinion was circulated before release to all judges in active service. See Circuit Rule 40(e). No judge favored hearing the case en banc.) Chief Judge Richard A. Posner, Circuit Judge Joel M. Flaum, Circuit Judge Frank H. Easterbrook. [97-2829] [969479-1] (patb)
1/21/98	ORDER: Final judgment filed per opinion. With costs: y. [97-2829] [1025507-1] (patb)
2/12/98	MANDATE ISSUED. No record to be returned. [97-2829] [969479-1] (nick)
2/20/98	Filed mandate receipt. [97-2829] [1034510-1] (fran)
4/27/98	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 97-1732. [97-2829] [1056207-1] (jame)
10/5/98	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 97-1732. [97-2829] [1105951-1] (heid)

[Filed Jul. 11, 1995—Docketed Jul. 13, 1995]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Civil Action No. 95 C 4006

Jury Trial Demanded

PAUL FELZEN, TRUSTEE OF
LOUISE LASKIN TRUST—1991,
Plaintiff,

v.

DWAYNE O. ANDREAS, RALPH BRUCE, JOHN H. DANIELS, HOWARD G. BUFFETT, LOWELL W. ANDREAS, JAMES R. RANDALL, MICHAEL D. ANDREAS, H.D. HALE, O. GLEN WEBB and MARTIN ANDREAS,
Defendants,

-and-

ARCHER DANIELS MIDLAND COMPANY,
a Delaware corporation,
Nominal Defendant.

COMPLAINT

Plaintiff, for its Complaint brought derivatively on behalf of nominal defendant Archer Daniels Midland Company ("ADM" or "the Company"), alleges upon information and belief, *inter alia,* based upon an investigation conducted by and through its attorneys except as to paragraph 6, which is alleged upon knowledge:

NATURE OF THE ACTION

1. This is a stockholder's derivative action brought on behalf of ADM against certain of the Company's present and former officers, directors and employees. Plaintiff complains of a course of conduct by defendants which caused ADM to systematically engage in price-fixing activities in violation of federal antitrust laws, and to fail to disclose information concerning such conduct, in violation of federal securities law.

2. As set forth in greater detail below, this Complaint alleges that the Company, through its officers and directors, has grossly mismanaged and failed to properly supervise its various divisions, employees, and agents and has made decisions relative to the business, operations and corporate governance of the Company itself and its affiliates which have caused and/or threatened to cause substantial losses to the Company and other damages.

3. The entire ADM Board of Directors knew or recklessly disregarded the fact that these violations were taking place. ADM's Board of Directors failed to adequately oversee ADM's officers and employees, failed to prevent their wrongdoing despite ample opportunity to do so, and failed to create a compliance or auditing program to prevent illegal activities or to detect them after they occurred.

4. Because defendants' illegal conduct was discovered by federal law enforcement officials, ADM and certain of its executives have been subjected to an extensive grand jury investigation, and the Company has seen its stock price decline and suffered significant damage to its reputation and goodwill.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 15 U.S.C. §§ 1, 4, 15, 26, 78n(a) and 78aa,

and 28 U.S.C. § 1331. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claims occurred in this District. This action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have.

PARTIES

6. Paul Felzen is a trustee of plaintiff Louise Laskin Trust—1991 (the "Trust"). The Trust owns and at all relevant times herein has continuously owned shares of common stock of ADM. Plaintiff brings this action derivatively on behalf of nominal defendant ADM.

7. Nominal defendant ADM is a public corporation organized under the laws of Delaware with its principal place of business at 4666 Faries Parkway, Decatur, Illinois. ADM is engaged in the business, among other things, of processing and merchandizing agricultural commodities and products. ADM's products include high fructose corn syrup (which is used in soft drinks and other food products), amino acid lysine (which is used as an animal feed supplement), and citric acid (which is used in the pharmaceutical and food and beverage industries). ADM's common shares are registered pursuant to Section 12 of the Securities and Exchange Act of 1934, 15 U.S.C. § 781, and trade on the New York Stock Exchange.

8. For its fiscal year ended June 30, 1994, ADM reported net earnings of more than $484 million on sales of over $11.3 billion. ADM is named as a nominal defendant herein solely in its derivative capacity and this action is brought on its behalf and no claims are asserted against it.

9. Defendant Dwayne O. Andreas is Chairman of the Board and Chief Executive Officer of ADM, and has been a member of ADM's Board of Directors since 1966. In 1994, Dwayne Andreas received from ADM a salary of

$2,972,630 and other annual compensation of at least $198,000.

10. Defendant Ralph Bruce has been a director of ADM since 1980, and is a former Executive Vice President of the Company. In 1994, Bruce received compensation of at least $75,000 from ADM.

11. Defendant John H. Daniels has been a director of ADM since 1957, and is a former Chairman of the Company. In 1994, Daniels received compensation of at least $100,000 from ADM.

12. Defendant Howard G. Buffett, until approximately July 1995, was a director of ADM and a Vice President of the Company.

13. Defendant Lowell W. Andreas has been a director of ADM since 1966, and is a former President of the Company. In 1994, Lowell Andreas received compensation of at least $75,000 from ADM.

14. Defendant James R. Randall is President of ADM and, since 1975, has been a member of the Company's Board of Directors. In 1994, Randall received compensation of at least $1.4 million from ADM.

15. Defendant Michael D. Andreas is Executive Vice President of ADM and Vice Chairman of its Board of Directors. Michael Andreas has been a member of ADM's Board of Directors since 1985. In 1994, Michael Andreas received compensation of at least $942,000 from ADM.

16. Defendant H.D. Hale is Chairman and Chief Executive Office of ADM Milling Co., a subsidiary of the Company, and has been a member of ADM's Board of Directors since 1973. In 1994, Hale received compensation of at least $800,000 from ADM.

17. Defendant O. Glen Webb is Chairman of the Board and President of ADM/Growmark, a subsidiary of ADM, and has been a member of ADM's Board of Di-

rectors since 1991. In 1994, Webb received compensation of at least $75,000 from ADM.

18. Defendant Martin Andreas is Senior Vice President of ADM and Executive Assistant to the Chief Executive Officer, and has been a member of ADM's Board of Directors since 1986.

19. Each of the foregoing individual defendants, because of his position as an officer and/or director of ADM, owes fiduciary duties to the Company and its stockholders in connection with the operations, management and supervision of the Company. As officers and/or directors of a publicly held company whose stock is registered with the Securities and Exchange Commission under the Securities and Exchange Act of 1934, the individual defendants had a duty to disseminate accurate and truthful information promptly with respect to the Company's operations and management, so that the market price of ADM securities would be based on truthful and accurate information and to insure that the Company's business was conducted in accordance with federal and state law.

20. The individual defendants participated in the wrongdoing complained of herein in order to (i) continue and prolong the illusion of ADM's ongoing growth and profitability and its success as a market leader in the agricultural products business, (ii) inflate the price of ADM's common stock, (iii) conceal the adverse facts concerning ADM's illegal conduct, lack of adequate internal controls, and management and future prospects, and (iv) protect and perpetuate their directoral or executive positions and the substantial compensation and prestige they obtained thereby.

CAUSE OF ACTION

21. Plaintiff repeats and reallages [*sic*] each of the foregoing allegations as if set forth fully herein.

22. ADM is currently the target of a Chicago-based federal grand jury investigation into what the Company has publicly termed "possible violations of federal antitrust laws and related crimes in the food additives industry."

23. The criminal probe, which is focusing on ADM's pricing activities with respect to high fructose corn syrup, amino acid lysine, and citric acid, has been substantially aided by the efforts of an inside "whistle-blower"—ADM's BioProducts Division president, Mark E. Whitacre, who, armed with FBI-supplied tape equipment, has helped federal investigators secretly record conversations and meetings between ADM's representatives and its competitors reflecting price fixing activities violative of federal antitrust law.

24. Federal investigators have also issued subpoenas, and obtained a search warrant, to obtain from the Company additional information concerning its illegal pricing practices. Additional subpoenas have been served upon ADM executives and managers as well as certain of the Company's competitors.

25. Neither these pricing practices nor any information concerning the practices was disclosed by ADM in its Proxy Statement dated September 14, 1994, which the Company's directors, including the individual defendants herein, caused ADM to publicly disseminate to ADM's shareholders in order to solicit votes for the election of ADM directors, including the individual defendants herein. The absence of such disclosure rendered the statements contained in the Proxy Statement materially misleading, in violation of Section 14(a) of the Securities and Exchange Act of 1934, 15 U.S.C. § 14n(a), and the rules promulgated thereunder by the Securities and Exchange Commission.

26. Each of the individual defendants owed ADM and its stockholders fiduciary duties of care, candor and loy-

alty and the duty to exercise, in the performance of their responsibilities as directors, reasonable care in the oversight and supervision of ADM's corporate affairs and management. The individual defendants violated those duties through their conflicting interests, lack of independence and intentional or reckless acts which caused or contributed to the commission of the conduct complained of herein in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and Section 14(a) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78n(a), and the rules promulgated thereunder by the Securities and Exchange Commission.

27. Based on the foregoing, the individual defendants have violated their fiduciary duties of care, loyalty, reasonable inquiry, oversight, good faith and supervision.

28. The individual defendants knowingly or recklessly caused ADM to engage in the wrongful conduct described herein, or were reckless or grossly negligent in failing to prevent ADM from engaging in such conduct and to ascertain and avert such misconduct.

29. The individual defendants' breaches of fiduciary duty have proximately caused ADM to suffer damages in an amount yet to be determined.

30. Plaintiff has no adequate remedy at law.

31. Plaintiff has not made a demand on ADM's board of directors to pursue the claims herein, because such a demand would have been a futile act for the reasons set forth below:

(a) The board itself is accused of a breach of its fiduciary duties and its members are implicated in and liable for abdicating their responsibility to the Company and its shareholders and for failing to put into place adequate internal controls and means of supervision to prevent the wrongful conduct referred to herein.

(b) A reasonable doubt exists that ADM's directors exercised valid business judgment because the wrongful actions and/or inactions by the individual defendants alleged herein amounted to breaches of their fiduciary duties of good faith, disclosure, due care and loyalty to ADM and its stockholders, and an abdication of the directors' responsibilities giving rise to liability to ADM.

(c) The ADM directors' actions and omissions, which resulted in ADM's improper activities, cannot have been the product of valid business judgment.

(d) At least a majority of the present ADM directors has a disabling conflict by virtue of their personal liability as defendants for the damages caused to ADM by their alleged wrongdoing and, therefore, could not be relied upon to reach a truly independent decision as to whether to commence an action against themselves and other persons responsible for the wrongdoing complained of herein.

(e) Each of the directors receives payments, benefits and other emoluments by virtue of his position with the Company. The directors are interested parties and cannot in good faith exercise independent business judgment in determining whether to bring this action against themselves.

(f) As a general matter in recent years, insurance policies covering the liability of an insured's officers and directors purport to exclude legal claims asserted directly by the insured against such persons. To the extent the Company maintains insurance coverage for the liability of any officers or directors and the policy or policies contain the foregoing exclusion, the insurance policy or policies would not protect the officers and directors if the Company asserted a claim directly against such individuals. Thus, there is a substantial disincentive for the directors to bring any action directly against any officers or directors.

WHEREFORE, plaintiff demands judgment as follows:

A. Against each individual defendant and in favor of nominal defendant ADM for the amount of damages sustained by ADM as a result of the wrongful conduct described herein;

B. Requiring the individual defendants and those under their supervision and control, on behalf of ADM and its shareholders, to implement and enforce policies, practices and procedures, including an appropriate anti-trust compliance program, designed to detect and prevent wrongful conduct of the type described herein;

C. Awarding plaintiff the costs and disbursements of this action, including reasonable attorneys' and experts' fees; and

D. Such other or further relief as the Court deems just and proper.

Plaintiff demands a trial by jury.

Dated: July 11, 1995

[Counsel listing omitted]

[Verification Omitted in Printing]

[Docketed Oct. 31, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption Omitted in Printing]

MEMORANDUM OPINION AND ORDER

Following the public disclosures of the government's criminal antitrust investigation of the Archer-Daniels-Midland Company ("ADM"), ADM has been named as a defendant in numerous civil litigation matters involving both antitrust and securities law allegations. Currently pending before this Court are seventeen cases [1] that have been consolidated before this Court in two consolidated complaints. *In re: Archer-Daniels-Midland, Inc. Securities*

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1 95 C 3979 *EM Lawrence Ltd. v. Archer-Daniels*
95 C 3980 *Madoff v. Archer Daniels, et al.*
95 C 3985 *Castaldo, et al. v. Archer Daniels, et al.*
95 C 4006 *Felzen v. Andreas, et al.*
95 C 4028 *Fuss, et al. v. Archer Daniels, et al.*
95 C 4031 *Gutter v. Archer Daniels, et al.*
95 C 4032 *Pozen, et al. v. Archer Daniels, et al.*
95 C 4036 *Stowers v. Archer Daniels, et al.*
95 C 4037 *Lorber v. Archer Daniels, et al.*
95 C 4041 *Graulich v. Andreas, et al.*
95 C 4091 *Scheniak, et al. v. Archer Daniels, et al.*
95 C 4093 *Seger v. Archer Daniels, et al.*
95 C 4233 *Damaskus v. Archer Daniels, et al.*
95 C 4234 *Fisher, et al. v. Archer Daniels, et al.*
95 C 4535 *Esner v. Andreas, et al.*
95 C 4745 *Cohen v. Archer Daniels, et al.*
95 C 5120 *David Essling Pen.Fd. v. Archer Daniels, et al.*

Litigation, Consolidated Case No. 95 C 3979, generally involves a class action securities action, brought on behalf of plaintiffs who purchased ADM common stock and who allege violations of Sections 10(b) and 20 of the Securities Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 of the Securities and Exchange Commission ("SEC"), promulgated thereunder. This consolidated complaint essentially alleges that during the alleged class period of September 16, 1992, through July 10, 1995, ADM's "earnings and success were driven in large part by the growth of its high fructose corn syrup ("HFCS"), citric acid and lysine production businesses, and also by increased prices for these products." (Cons. Compl. ¶ 7). Plaintiffs specifically allege that, "While the defendants publicly attributed this success to [ADM]'s efficiency and to favorable market conditions, in reality, defendants knew that this was not the case. Rather, [ADM]'s success in the lysine, HFCS and citric acid businesses was possible only because, since at least 1992, ADM had been colluding with its competitors in these markets to fix the worldwide production volume and prices for these products in order to reap illegal and undeserved profits. The defendants concealed this material information from the public in the Company's SEC filings and public announcements in order to inflate artificially the market price of ADM common stock." (*Id.*)

Consolidated Case No. 95 C 4006 makes similar derivative allegations on behalf of plaintiff ADM's shareholders. This complaint specifically alleges that the named director defendants "caused ADM systematically to engage in illegal price-fixing activities involving several of its major products in violation of the federal antitrust laws." (Cons. Compl. ¶ 1).

At this initial point in this securities litigation, this Court has been called upon to determine the proper venue for all future proceedings in both consolidated cases. The

defendants in both consolidated actions have filed a motion, pursuant to 28 U.S.C. § 1404(a), to have these actions transferred to the United States District Court for the Central District of Illinois for further consolidation with three other separate actions currently pending in that district. For the reasons that follow, defendants' motion to transfer venue of the two consolidated cases is granted.

ANALYSIS

ADM seeks transfer of this action to the Central District of Illinois pursuant to 28 U.S.C. § 1404(a), which states:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1404(a). Transfer is appropriate under § 1404(a) where the moving party demonstrates that (1) venue is proper in the transferor district, (2) venue and jurisdiction are proper in the transferee district, and (3) the transfer will serve the convenience of the parties, the convenience of the witnesses, and the interest of justice. *Vandeveld v. Christoph,* 877 F. Supp. 1160, 1167 (N.D. Ill. 1995). In this case, the first two factors are not in dispute. Venue is proper in this forum as well as in the Central District of Illinois, the forum where ADM is located. *See* 15 U.S.C. § 78; 28 U.S.C. § 1391(b) and (c). Thus, this opinion focuses on the third factor—whether a transfer will serve the convenience of the parties, the convenience of the witnesses, and the interest of justice.

In evaluating the convenience and fairness of transfer under § 1404(a), the Court must consider both the private interests of the parties and the public interest of the Court. Private interests include: (1) plaintiff's choice

of forum, (2) the situs of material events, (3) the relative ease of access to sources of proof in each forum including the court's power to compel the appearance of unwilling witnesses at trial and the costs of obtaining the attendance of witnesses, (4) convenience to the parties—specifically, their respective residences and abilities to bear the expense of trial in a particular forum. *See Van Holdt v. Husky Injection Molding Systems, Ltd.*, 887 F. Supp. 185, 288 (N.D. Ill. 1995); *G. H. Miller & Co. v. Hanes*, 566 F. Supp. 305, 307 (N.D.Ill. 1983); 15 C. Wright, A. Miller & E. Cooper, *Federal Practice* §§ 3849-53 (1986). Public interest factors include the court's familiarity with applicable law, the desirability of resolving controversies in their locale and the principle that "related litigation should be transferred to a forum where consolidation is feasible." *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 221 (7th Cir. 1986). *See Van Gelder V. Taylor*, 621 F. Supp. 613, 619 (N.D. Ill. 1985). A party seeking a § 1404(a) transfer bears the burden of showing that "the transferee forum is clearly more convenient" than the transferor forum. *Heller Financial, Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1293 (7th Cir. 1989).

There is no dispute in this case that defendant ADM is a public corporation organized under the laws of Delaware with its principal place of business at 4666 Faries Parkway, Decatur, Illinois. ADM is engaged in the business of, among other things, processing and merchandising agricultural commodities and products. ADM's three main products are high fructose corn syrup (which is used in soft drinks and other food products), amino acid lysine (which is used as an animal feed supplement), and citric acid (which is used in the pharmaceutical and food and beverage industries). All of ADM's executive officers have their offices in Decatur. (Schmalz Dec., ¶ 3). Three of the four meetings per year of ADM's Board of Directors take place in Decatur. (*Id.*, ¶ 4). ADM's central

recordkeeping, its corporate records, and its central computer operations are located in Decatur. (*Id.*, ¶ 7).

On June 28, 1955, ADM publicly disclosed that three separate grand juries, currently sitting in Chicago, San Francisco and Atlanta, are investigating ADM's corporate officers' possible violations of federal antitrust laws. These three grand jury investigations have apparently been topically divided by the Justice Department to coincide with the three main products sold by ADM: lysine, citric acid and high fructose corn syrup.

In evaluating the convenience and fairness of tranfer under § 1404(a), the Court has carefully considered both the private interests of the parties and the public interest of the Court. This Court's evaluation of all the relevant factors under 28 U.S.C. § 1404(a) has led it to conclude that a transfer of these two consolidated cases to the Central District of Illinois is appropriate in this case. The Court's evaluation of each of these factors follows:

A. *Plaintiff's Choice of Forum*

This Court has already noted on numerous occasions that plaintiff's choice of forum has diminished in significance since the enactment of § 1404(a). *Van Holdt v. Husky Injection Molding Systems, Inc.*, 887 F. Supp. at 188. Moreover, the weight to be given to plaintiff's choice of forum is lessened if the chosen forum has relatively weak connections with the operative facts giving rise to the claim. *Id.* In this case, the parties have little or no real connection to this district. The plaintiffs only real connection to this district is that their attorneys happen to have offices in Chicago. However, the convenience to plaintiffs' counsel is not a proper consideration. *Id.* at 190; *Sypert v. Miner*, 266 F.2d 196, 199 (7th Cir.), *cert. denied*, 361 U.S. 832 (1959); *Koos, Inc. v. Performance Industries, Inc.*, 747 F. Supp. 487, 490.

Consolidated Case No. 3979 lists twenty-one different plaintiffs. (Cons. Compl. ¶ 11). However, there is no indication that these plaintiffs are residents of this district. Consolidated Case No. 95 C 4006 lists two plaintiffs. Plaintiff Paul Felzen is a trustee of plaintiff Louise Laskin Trust—1991, which is located in the State of Florida. (Cons. Compl. ¶ 12). The other plaintiff, Sandra Esner, is a resident of the Commonwealth of Pennsylvania. Cons. Compl. ¶ 13).

The Court's review of the plaintiffs' choice of forum leads it to conclude that this factor favors the transfer of this case to the defendants' home district which has a more substantive relationship to this cause of action.

B. *Situs Of Material Events*

This Court especially reviews the situs of material events in deciding a motion to transfer venue to determine whether a lawsuit has any material relationship to this district. The Court's review of this factor strongly favors the transfer of this case. The consolidated securities complaint principally alleges omissions of material information related to alleged criminal antitrust which should have been made by ADM. The consolidated derivative complaint alleges that ADM's directors breached duties to ADM by failing to supervise its employees in a manner which would have prevented their alleged criminal antitrust violations.

Because ADM's headquarters are in Decatur, ADM's Board of Directors meets in Decatur for three of its four yearly meetings; and all of ADM's executive offices are located in Decatur. This Court, therefore, concludes that the Central District of Illinois is the situs of events giving rise to the two consolidated complaints currently pending before this Court. Moreover, ADM's divisions that produce the three products which are the subject of the three pending grand jury investigations are headquartered in

Decatur. The Court's careful review of the two consolidated complaints gives this Court no reason to believe that any material events related to this litigation occurred in the Northern District of Illinois. At best, the consolidated derivative complaint obliquely states that: "[m]any of the acts and transactions giving rise to the violations complained of herein, including the preparation and dissemination to the investing public of false and misleading information, occurred in the District." (Cons. Compl. ¶ 11). However, this broad allegation would also apply to the Central District of Illinois as well as many other federal districts where the alleged international criminal antitrust conspiracy occurred. Given the undisputed facts of this case, which include the unassailable fact that ADM's offices and operations are headquartered in Decatur, this Court concludes that its consideration of the material situs of these consolidated complaints strongly favors a transfer of this case to the Central District of Illinois.

C. *Convenience of the Witnesses and Parties*

The Court next examines the convenience of the witnesses and parties. The Court must determine the relative ease of access to sources of proof in each forum. ADM submits that since all of its offices and relevant employees are in Decatur, this factor weighs heavily in their favor. The plaintiffs have not and can not rebut this fact. Instead, plaintiffs merely allege that Chicago is a more convenient transportation point than the Central District of Illinois. The plaintiffs have not specified any witnesses who may be unavailable in the Central District of Illinois. This Court therefore concludes that the convenience of witness factor favors the transfer of this case to the Central District of Illinois.

The plaintiffs strongly rely on the fact that the grand jury which is investigating possible criminal antitrust activities in the lysine market is located in Chicago. The

Court specifically finds that this fact does not justify venue of these two consolidated securities cases in this district. First, this Court recognizes a clear distinction between the legal issues involved in the criminal antitrust investigation and the legal issues in these two consolidated civil securities cases. While there may be some factual overlap between the factual investigation of this criminal grand jury and the litigants' efforts in these consolidated securities cases, this overlap does not translate into any conveniences for the witnesses in this litigation because it is highly unlikely that there will be any workable coordination between the criminal and civil investigations. In fact, it is highly likely that no effective civil discovery can proceed until the Department of Justice concludes its criminal investigations. Furthermore, the fact that the Chicago grand jury is only investigating one of ADM's three major product lines further diminishes the likelihood that any effective coordination can occur between the two consolidated cases and the criminal grand jury sitting in Chicago.

Finally, in plaintiffs' last-ditch efforts to convince this Court that venue is appropirate in this district they have noted that: (1) one of the key witnesses in this litigation who formerly worked for ADM, Mark Whitacre, is presently working in the Northern District of Illinois and (2) ADM has filed a brief with the Multi-District Litigation ("MDL") Panel which concedes that the civil antitrust MDL cases involving the lysine product should be transferred to the Northern District of Illinois. Neither of these two arguments, when closely examined are persuasive to the Court.

With respect to Mark Whitacre, the plaintiffs have not asserted that his testimony will not be available to them in the Central District of Illinois. In fact, the probability is that Mr. Whitacre will never testify in any of the civil cases and that the parties will instead rely on any testimony offered by Mr. Whitacre in any public criminal

proceedings that may occur in the future. Moreover, there is no guarantee that Mr. Whitacre will be a resident of this district if and when these two consolidated civil actions reach the trial stage.

The Court also believes that ADM's recent MDL pleading, which relates to numerous related civil antitrust cases, does not change its analysis under the venue factors which must be considered by the Court. The Court's close review of this MDL pleading indicates that ADM has essentially never wavered from its position that most of its civil litigation should proceed in the Central District of Illinois. In this MDL pleading, ADM merely has decided that it should follow the same strategic decision of the Justice Department and similarly urge a separate consolidation of all civil antitrust cases along its three separate product lines. Given this strategy, it is not surprising at all that ADM in its MDL filing seeks to have the citric acid and/or HFCS antitrust actions consolidated in the Central District of Illinois. In view of this request and to preserve the separate integrity of the HFCS and lysine cases, ADM reluctantly supported the transfer of all lysine civil antitrust to this district after initially requesting that these lysine cases be sent to the Central District of Illinois. Thus, this MDL filing, when viewed in its proper context, does not suggest or concede that this district is the proper venue for the consolidated litigation pending before this Court. In fact, factual information contained in this MDL pleading merely reiterates that the three products at issue in the related criminal and civil litigation are principally manufactured in the Central District of Illinois. Thus, the Court's own objective review of ADM's MDL pleading leads the Court to conclude that this MDL pleading supports, rather than weakens, ADM's motion to transfer venue of these two consolidated cases to the Central District of Illinois.

C. *The Overall Interests of Justice*

Finally, the Court has independently reviewed whether the overall interests of justice would be served by a transfer of venue. All of the factors reviewed to this point compel the transfer of the venue to the Central District of Illinois, the district having the most meaningful relationship to these two consolidated actions. Here, the overall interests of justice certainly favor a transfer to the Central District of Illinois to facilitate further consolidation with similar cases now pending there.[2] *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 221 (7th Cir. 1986).

The plaintiffs' main argument against the transfer of these two consolidated cases is that ADM will secure some sort of "home-court" advantage. This argument asserts too much. If the Court was to accept the logic of this argument our American system of jurisprudence would completely breakdown. The essence of the plaintiffs' assertion is that they will not be able to receive a fair trial, if these consolidated cases ever reach that stage, in ADM's home district. The fallacy of this assertion has been proven false over and over again by jury verdicts returned against large corporation [*sic*] in their own home districts throughout the history of our jurisprudence. This Court flatly rejects the assertion that its esteemed colleague in the Central District of Illinois will not be able to properly monitor jury selection in a fashion that will ensure that all parties in this case receive a fair trial.

Plaintiffs' allegations of prejudice in the Central District of Illinois are also ill founded. The Danville Division of the Central District of Illinois, in which Decatur

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2 While plaintiffs' counsel asserts that the current plaintiffs in the Central District of Illinois would be willing to accept a transfer to this Court, this factor carries little, if any, weight with this Court because this simply represents an accommodation between plaintiffs' counsel rather than an acknowledgment that venue is improper in the Central District of Illinois.

is located, comprises 12 counties with a population of 679,000. Even if all of ADM's 1,800 employees and their friends, relatives and acquaintances were automatically excluded from the relevant jury pool, it defies reality to believe that eight fair and impartial persons, a typical civil jury of six persons and two alternates, could not be found in Danville to render a decision in this case.

CONCLUSION

This Court finds that these two consolidated actions bear no meaningful relationship to this district and therefore should be transferred to the Danville Division of the Central District of Illinois for further consolidation with the related pending cases in Danville. Defendants' motion for transfer of consolidated cases No. 95 C 3939 and No. 95 C 4006 is granted. All further litigation matters should be brought before the transferee Court.

ENTER:

/s/ Ruben Castillo
RUBEN CASTILLO
United States District Judge

October 31, 1995

[Filed Dec. 27, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

Case No. 95-2279

Honorable Harold A. Baker
Judge Presiding

PAUL FELZEN, TRUSTEE OF LOUISE LASKIN TRUST - 1991 and SANDRA ESNER,
Plaintiffs,

v.

DWAYNE O. ANDREAS, RALPH BRUCE, JOHN H. DANIELS, HOWARD G. BUFFETT, LOWELL W. ANDREAS, JAMES R. RANDALL, MICHAEL D. ANDREAS, H.D. HALE, O. GLENN WEBB, MARTIN ANDREAS, MARGARETTA ROCKEFELLAR, F. ROSS JOHNSON, RAY A. GOLDBERG, GAYLORD O. COAN, JOHN K. VANIER, SHREVE H. ARCHER, JR., M. BRIAN MULRONEY, AND ROBERT S. STRAUSS,
Defendants,

and

ARCHER DANIELS MIDLAND COMPANY,
a Delaware corporation,
Nominal Defendant.

DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED AND AMENDED DERIVATIVE COMPLAINT OR, IN THE ALTERNATIVE, TO STAY THE ACTION

The undersigned Defendants move to dismiss the Consolidated and Amended Derivative Complaint for failure

to state a claim upon which relief can be granted. In addition, the undersigned Defendants move to dismiss on the ground that the Plaintiffs failed to make the requisite demand on the nominal corporate defendant, ARCHER DANIELS MIDLAND COMPANY, a Delaware corporation, prior to filing their shareholders derivative action. In the alternative, the undersigned Defendants move the Court for a stay of this consolidated action pending resolution of related criminal and civil litigation. The grounds for Defendants' motion are more fully stated in the accompanying Memorandum of Law.

Defendants respectfully request oral argument on this Motion.

WHEREFORE, the undersigned Defendants request this Court to enter an Order dismissing the Consolidated and Amended Derivative Complaint, or, in the alternative, to enter an Order staying the action pending resolution of the related criminal and civil litigation.

/s/ JAMES E. PECKERT
ARCHER DANIELS MIDLAND COMPANY
Its Attorneys

[Counsel Listing Omitted]

/s/ THOM MOSS
Individual Defendants
Their Attorneys

[Counsel Listing Omitted]

[Filed May 17, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

[Caption Omitted in Printing]

CONSOLIDATED AND AMENDED DERIVATIVE COMPLAINT

Plaintiffs, by their attorneys, for their Consolidated and Amended Derivative Complaint against defendants, allege on information and belief, except those allegations that pertain to the named plaintiffs and their counsel, which are based on personal knowledge. Plaintiffs' information and belief is based, *inter alia*, on the investigation made by and through their attorneys, as follows:

INTRODUCTION AND OVERVIEW OF ACTION

1. This is a stockholders' derivative action brought on behalf of and for the benefit of Archer-Daniels-Midland Co. ("ADM" or the "Company") against ADM's Board of Directors (the "Director Defendants") for breaches of fiduciary duty, abuse of control, and gross mismanagement. The Director Defendants caused ADM systematically to engage in illegal price-fixing activities involving several of its major products in violation of the federal antitrust laws. On June 28, 1995, the Company disclosed that three grand juries, sitting in Chicago, San Francisco and Atlanta, are investigating its alleged violations of the federal antitrust laws and related crimes in the food additives industry. These investigations are directed towards price-fixing with respect to lysine, citric acid and high fructose corn syrup.

2. Following this public disclosure, the Company, and certain of its directors and executive officers, were named in several securities fraud class action suits, subsequently consolidated in this District and captioned *in re Archer-Daniels-Midland, Inc. Securities Litigation*, Case No. 95-C-3979. The plaintiff shareholders brought these securities actions on behalf of all persons who purchased the common stock of ADM between September 16, 1992 and July 10, 1995 (the "Class Period") alleging that during the Class Period, ADM and its corporate insiders misrepresented the Company's earnings, profitability, results of operations and business prospects as a result of ADM's price-fixing and other unlawful anti-competitive activities.

3. The Company also has been sued by numerous purchasers of lysine, high fructose corn syrup and citric acid in individual and class actions alleging that ADM and other co-conspirators violated the federal antitrust laws when they agreed to fix, stabilize and maintain at artificially high levels the prices for these products.

4. The ongoing investigation of price-fixing followed former ADM senior executive Marc Whitacre's ("Whitacre") disclosure to federal authorities that such practices were encouraged at ADM. Since the price-fixing allegations became public, Whitacre has disclosed further unlawful conduct on the part of ADM, including the deposit of illegal payments to senior officers and managers in foreign accounts as supposed payment of phony invoices. ADM, in turn, has accused Whitacre and others of embezzling that money. Whitacre maintains that these illegal slush funds were authorized by senior executives of the Company, including certain Director Defendants, in an effort to avoid payment of federal income taxes.

5. As a result of ADM's violations of the federal antitrust and securities laws as well as other violations of law, the Director Defendants have exposed ADM to enormous liability for those violations and considerable expense of defending itself. Currently, 85 state and federal

lawsuits by customers and shareholders alike are pending against ADM as a result of the Director Defendants' actions. To date, ADM has agreed to pay $25 million to settle the lysine civil antitrust case. This payment is not covered by any insurance. In fact, the Company recently disclosed that it had reserved $31 million to cover its litigation costs. Plaintiffs, therefore, seek to recover monies to compensate ADM for damages paid or awarded to plaintiffs and the putative classes in both the private antitrust and the securities lawsuits, the costs of defending itself in any criminal and civil actions resulting from its illegal behavior, and for any fines and/or penalties imposed by the federal government for the lilegal price-fixing and violation of other laws. In addition, as a result of the Director Defendants' having caused the Company to engage in the aforementioned unlawful conduct, the Company's goodwill has been impaired and its credit rating lowered. Therefore, the Company has incurred increased costs in raising capital.

6. By reason of their corporate positions and their ability to control the business and corporate affairs of ADM the Director Defendants owed the Company and its stockholders fiduciary obligations of full disclosure, fidelity, trust, and loyalty. The Director Defendants were required to use their ability to manage ADM in a fair, just and equitable manner, as well as to act in furtherance of the best interests of ADM and its stockholders and not in furtherance of their own personal interests or in violation of law. In addition, each of the Director Defendants owed ADM the duty to exercise due care and diligence in the management and administration of the Company's affairs and in the use and preservation of its property and assets. In violation of their fiduciary duties, the Director Defendants permitted the Company to conduct its business in an unsafe, imprudent and illegal manner by pursuing unsound practices, thereby wasting ADM's assets.

7. The Director Defendants ratified and/or endorsed the ongoing violations of law complained of herein and

the conduct of ADM's officers and employees that resulted in those violations. That ratification and/or endorsement involved a knowing and culpable violation of the Director Defendants' obligations as corporate directors, an absence of good faith on their part, and a reckless disregard for their fiduciary duties to the Company and its public shareholders. The Director Defendants were aware of, or pursuant to reasonable inquiry should have been aware of, the ongoing violations of law in which ADM was engaging, the risks of serious injury to ADM as a result of its engaging in those violations of law, and the personal benefits they obtained as a result of causing ADM to engage in price-fixing and other unlawful, anti-competitive activities.

8. As alleged in greater detail in paragraphs 28 and 29 of this Complaint, the Director Defendants are implicated in the wrongdoing and/or controlled by those implicated in the wrongdoing and would reject any demand by plaintiffs that any of the Director Defendants prosecute this derivative action. Therefore, any such demand by plaintiffs would be futile.

JURISDICTION AND VENUE

9. This Court has jurisdiction under 28 U.S.C. § 1332 (a)(1). Plaintiffs and all defendants are residents and citizens of different states. The amount in controversy between the plaintiffs and the defendants exceeds $50,000, exclusive of interest and costs. This is not a collusive action to confer jurisdiction on this Court which it would not otherwise have.

10. Venue is proper in this District. Many of the acts and transactions giving rise to the violations of law complained of herein, including the preparation and dissemination to the investing public of false and misleading information, occurred in this District.

PARTIES

11. Plaintiff Paul Felzen is a trustee of plaintiff Louise Laskin Trust-1991 (the "Trust"), which is located in the State of Florida. The Trust owns, and at all relevant times herein has continuously owned, shares of the common stock of ADM.

12. Plaintiff Sandra Esner, a resident of the Commonwealth of Pennsylvania, owns, and at all relevant times herein has continuously owned, shares of the common stock of ADM.

13. Nominal defendant ADM is a public corporation organized under the laws of Delaware with its principal place of business at 4666 Faries Parkway, Decatur, Illinois. ADM is engaged in the business of, among other things, processing and merchandizing agricultural commodities and products. ADM's products include high fructose corn syrup (which is widely used in soft drinks and other food products), the amino acid lysine (which is used as an animal feed supplement), and citric acid (which is used in the pharmaceutical and food and beverage industries). ADM's common shares are registered pursuant to Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 781, and trade on the New York Stock Exchange. ADM is named as a nominal defendant solely in its derivative capacity.

14. Set forth below is information regarding the individual defendants who served, at all times relevant to the claims set forth herein, as officers of ADM and members of ADM's Board of Directors:

(a) Defendant Dwayne O. Andreas ("D. Andreas") was, at all relevant times, Chief Executive Officer of ADM and Chairman of the Company's Board of Directors. As of September 13, 1995, D. Andreas was the beneficial owner of 23,855,393 shares of ADM common stock, more than 4.7 percent of the total shares outstanding. For the fiscal year ended June 30, 1995, D. Andreas received

salary and other compensation, including stock options, of approximately $3,764,841.

(b) Defendant Michael D. Andreas ("M.D. Andreas") was, at all relevant times, Executive Vice President of ADM and Vice-Chairman of the Company's Board of Directors. M.D. Andreas directly participated in ADM's antitrust violations and is a prime target of the government's investigation. As of September 13, 1995, M.D. Andreas was the beneficial owner of 6,032,157 shares of ADM common stock, 1.1 percent of the total shares outstanding. For the fiscal year ended June 30, 1995, M.D. Andreas received salary and other compensation from ADM of approximately $1,196,004, plus options to purchase 60,000 shares of ADM common stock at $16.8333 per share.

(c) Defendant James R. Randall ("Randall") was, at all relevant times, President of ADM and a member of the Company's Board of Directors. As of September 13, 1995, Randall was the beneficial owner of 1,089,116 shares of ADM common stock, .20 percent of the total shares outstanding. For the fiscal year ended June 30, 1995, Randall received salary and other compensation from ADM of approximately $1,686,004, plus options to purchase 75,000 shares of ADM common stock at $16.8333 per share.

(d) Defendant Ralph Bruce ("Bruce") was, at all relevant times, a director and was also a former Executive Vice President of ADM. As of September 13, 1995, Bruce was the beneficial owner of 263,102 shares of ADM common stock.

(e) Defendant John H. Daniels ("Daniels") was, at all relevant times, a director and a former Chairman of ADM's Board of Directors. As of September 13, 1995, Daniels was the beneficial owner of 461,114 shares of ADM common stock, .09 percent of the total shares outstanding.

(f) Defendant Lowell W. Andreas ("L. Andreas") was, at all relevant times, a director and a former President of ADM. As of September 13, 1995, L. Andreas was the beneficial owner of 6,081,364 shares of ADM common stock, 1.20 percent of the total shares outstanding.

(g) Defendant John K. Vanier ("Vanier") was, at all relevant times, a Director of the Company. As of September 13, 1995, Vanier was the beneficial owner of 9,083,674 shares of ADM common stock, 1.80 percent of the total shares outstanding.

(h) Defendant Martin L. Andreas ("M.L. Andreas") was, at all relevant times, Senior Vice President and a Director of the Company. As of September 13, 1995, M.L. Andreas was the beneficial owner of 1,471,849 shares of ADM common stock, .29 percent of the total shares outstanding. For the fiscal year ended June 30, 1995, M.L. Andreas received salary and other compensation, including stock options, of approximately $1,202,004.

(i) Defendant M. Brian Mulroney ("Mulroney") was, at all relevant times, a Director of the Company. As of September 13, 1995, Mulroney was the beneficial owner of 511 shares of ADM common stock.

(j) Defendant H.D. Hale ("Hale") was, at all relevant times, a Director of the Company and Chairman and Chief Executive Officer of ADM Milling Co., a subsidiary of the Company. As of September 13, 1995, Hale was the beneficial owner of 13,794,268 shares of ADM common stock, 2.70 percent of the total shares outstanding. For the fiscal year ended June 30, 1995, Hale received salary and other compensation, including stock options, of approximately $953,521.

(k) Defendant O. Glen Webb ("Webb") was, at all relevant times, a Director of the Company and Chairman and Chief Executive Officer of Growmark, Inc., a farmer-owned cooperative partly owned by ADM. As of September 13, 1995, Webb was the beneficial owner of 2,029,046 shares of ADM common stock, .40 percent of the total shares outstanding.

(l) Defendant F. Ross Johnson ("Johnson") was, at all relevant times, a Director of the Company. As of September 13, 1995, Johnson was the beneficial owner of 132,331 shares of ADM common stock, .03 percent of the total shares outstanding.

(m) Defendant Shreve M. Archer ("Archer") was, at all relevant times, a Director of the Company. As of September 13, 1995, Archer was the beneficial owner of 1,426,746 shares of ADM common stock, .25 percent of the total shares outstanding.

(n) Defendant Ray A. Goldberg ("Goldberg") was, at all relevant times, a Director of the Company. As of September 13, 1995, Goldberg was the beneficial owner of 544 shares of ADM common stock.

(o) Defendant Robert S. Strauss ("Strauss") was, at all relevant times, a Director of the Company. As of September 13, 1995, Strauss was the beneficial owner of 33,487 shares of ADM common stock.

(p) Defendant Margaretta Rockefeller ("Rockefeller") was, at all relevant times, a Director of the Company. As of September 13, 1995, Rockefeller was the beneficial owner of 13,216 shares of ADM common stock.

(q) Defendant Howard G. Buffett ("Buffett") was, at all relevant times until his resignation in July, 1995, a Director of the Company.

15. Common stock beneficially owned by all directors and executive officers as a group is 72,653,139 shares representing 14.39% of the outstanding shares.

THE DUTIES OF THE ADM DIRECTORS AND OFFICERS

16. Each of the Director Defendants owed the Company and its shareholders the duty to exercise a high degree of care, loyalty and diligence in the performance of his or her individual responsibilities with respect to the management and administration of the affairs of ADM, as well as in the use and preservation of its property and assets. Each of the Director Defendants approved and/or ratified anti-competitive activities and illegal foreign payments. The conduct of the defendants complained of herein involved, *inter alia,* the following: (a) knowing and culpable violation of their obligations as directors and/or officers of ADM; (b) the absence of good faith on their part; and (c) a reckless disregard for their duties to the Company and its shareholders of which the defendants were aware, or should have been aware, that caused serious injury to the Company, allowed these defendants to obtain personal benefits, and subjected the Company to substantial legal exposure.

17. To discharge their legal duties, the Director Defendants were required to exercise reasonable and prudent supervision over the Company's management, policies, practices, controls, and financial affairs. Pursuant to their fiduciary obligations, the Director Defendants are required to use the same care and diligence as would an ordinary prudent person in a similar position. By virtue of this obligation, these defendants were required, but failed among other things:

(a) to undertake a proper and adequate investigation and evaluation of the Company's: (1) product pricing activities to ensure that ADM was not violating the federal antitrust laws; (2) dissemination of information to the public to ensure that ADM was not violating the federal securities laws; and (3) management structure to prevent monies from being improperly removed from the Company to its officers for inappropriate and illegal activities. As a result of the Director Defendants' failure to undertake a proper and adequate investigation and evaluation of these issues, they caused the Company to incur costs of at least $25 million with respect to the settlement of the lysine antitrust action plus attorneys' fees and other costs of defense incurred to date, and exposed it to the imposition of additional fines, penalties, substantial attorneys fees, and other damages;

(b) to manage, conduct, supervise, and direct the business and affairs of ADM carefully, prudently and in good faith, in accordance with the laws, rules and regulations of the federal government, State of Illinois, and the Articles and By-Laws of ADM;

(c) to exercise reasonable control and supervision over the officers and employees of ADM;

(d) to exercise reasonable care in drafting, reviewing, proposing, and evaluating the prudence and soundness of policies and practices to be undertaken by ADM;

(e) to establish guidelines and policies to govern adequately the structure and organization of the Company's operations, including its pricing practices, reporting practices and accounting practices and the reporting thereof;

(f) neither to violate, nor knowingly or recklessly to permit any officer, director or employee of ADM to violate, applicable federal, state or local laws, rules and regulations, including the federal and state securities laws, and federal and state antitrust laws;

(g) to maintain a proper division of authority and responsibility among the officers and directors of ADM so as to prevent the dominance of any officer or director, by any other officer or director in the conduct of the business and affairs of ADM;

(h) to become and to remain informed as to how ADM was, in fact, operating to ensure that ADM did not engage in unsafe, imprudent, unsound or illegal practices;

(i) upon receiving notice or information of an unsafe, imprudent, unsound or illegal practice, to make a reasonable investigation in connection therewith and to take steps to correct that condition or practice;

(j) to establish and to maintain systematic and accurate books and records of the business and affairs of ADM and procedures for the reporting of the business and affairs to the Board of Directors and periodically to investigate, or cause an independent investigation to be made of, ADM's books and records;

(k) to maintain and to implement an adequate and functioning system of internal financial, accounting controls and management information systems, such that ADM's assets would be safeguarded, its financial statements and information would be accurately recorded and reported, and corporate managers were, and would be given prompt notice of serious problems or divergences;

(l) to supervise the preparation and filing of any audited financial statements, reports, or other information required by law from ADM, including the Company's Form 10-Ks, Form 10-Qs, annual reports and proxies; and to examine and evaluate any reports of examinations, audits, or other information required by federal or state law concerning the financial condition of ADM and to make full and accurate disclosure of all material facts concerning, *inter alia*, each of the subjects and duties set forth above; and

(m) to refrain from obtaining personal benefit at the expense of ADM and its public shareholders.

18. The defendants participated in the wrongdoing complained of herein to benefit themselves by enabling themselves to become directors and officers of a much

larger public corporation, to create and to perpetuate the illusion of the Company's success, and to inflate the price of its common stock and to conceal the adverse facts concerning ADM's wrongful conduct, management, financial position and future prospects so that they could, *inter alia*: (a) protect and perpetuate their directorial and/or executive positions and increase the substantial compensation, perquisites, business opportunities and prestige they obtained thereby; and (b) inflate the price of the Company's common stock in order to enhance the value of their securities holdings and options. Such participation involved, among other things, planning and creating, or causing to be planned and created, proposing, or causing the proposal of, and authorizing, approving and acquiescing in the wrongful conduct complained of herein.

CONCERTED ACTION

19. Each of the defendants pursued a common course of conduct, acted with, conspired with and aided and abetted one another to accomplish the violations of fiduciary duties complained of herein. The conspiracy, common enterprise and common course of conduct commenced at least by early 1991, and ultimately involved each of the defendants. The purpose and effect of the conspiracy, common enterprise and common course of conduct complained of was, *inter alia*, to cause ADM to expand and grow so that the defendants could control a much larger entity thus allowing them to increase the value of their own investment and protect their own position and compensation. That expansion was accomplished by, among other things, controlling the market for ADM's products through a scheme of price-fixing, and setting up and permitting the use of slush funds for improper and illegal purposes. Each Director Defendant was a direct, necessary and substantial participant in the conspiracy, common enterprise and common course of conduct complained of herein.

20. Each of the defendants named herein aided and abetted and rendered substantial assistance to accomplish the violation of fiduciary duties. In taking the actions, to aid and abet and substantially assist the violation of fiduciary duties complained of, each defendant acted with an awareness of the wrongdoing and realized that his or her conduct would and did substantially assist the violations complained of.

21. As members of ADM's Board of Directors or management, the defendants were themselves directly responsible for failing to monitor or for authorizing or permitting the authorization of ADM's price-fixing activities and use of illegal slush funds. Each of them had knowledge of and actively participated in and approved of the wrongdoing and/or abdicated his or her responsibilities with respect to the wrongdoing. The alleged acts of wrongdoing were committed outside of standard, accepted corporate practices and have subjected ADM, to date, to a loss in excess of $25 million.

22. Each of the defendants is liable as a direct participant in, an aider and abettor of, and/or a co-conspirator with respect to the violations of fiduciary duties and had the power and influence to cause, and did cause, ADM to engage in the conduct complained of herein.

DERIVATIVE ALLEGATIONS AND DEMAND FUTILITY

23. Plaintiffs bring this action derivatively in the right of, and for the benefit of, ADM to redress injuries suffered and to be suffered by ADM. These injuries are the direct result of the breaches of fiduciary duties, corporate mismanagement and abuses of control which led to violations of federal and state law.

24. Plaintiffs will adequately and fairly represent the interests of ADM and its shareholders in enforcing and

prosecuting their rights and have obtained counsel competent and practiced in litigating derivative actions.

25. There were sixteen (16) ADM directors on the Board on July 11, 1995, the date this derivative action was initially filed. Those directors were: Dwayne O. Andreas, Lowell W. Andreas, Michael D. Andreas, Martin Andreas, John H. Daniels, Jamie R. Randall, H.D. Hale, O. Glenn Webb, Ray A. Goldberg, John K. Vanier, Ralph Bruce, Shreve M. Archer, Jr., F. Ross Johnson, M. Brian Mulroney, Robert S. Strauss, and Margaretta Rockefeller. Prior to July 11, 1995, Howard G. Buffett publicly announced he had resigned; he was subsequently replaced by G.O. Coan.

26. Because a majority of the ADM Board was not disinterested and independent, and was therefore unable to objectively decide the merits of plaintiffs' claims, demand on the Board would have been futile, and is therefore excused.

27. Any demand made by plaintiffs to the ADM Board to institute this action is excused under Rule 23.1 of the Federal Rules of Civil Procedure. Such demand would be a futile and a useless act for the following reasons:

A. A Majority Of The Board Is Interested And/Or Lacks Independence

28. For the reasons set forth herein, a majority of ADM's directors are interested and/or are controlled and dominated by defendants D. Andreas, M.D. Andreas and Randall (the "Controlling Directors") each of whom is an interested director. Furthermore, because defendants D. Andreas, M.D. Andreas and Randall are interested and are Controlling Directors, the remaining directors could not exercise their independent judgment with respect to any demand made on the Board.

(a) Defendant D. Andreas, as Chief Executive Officer of ADM and Chairman of the Board of Directors is in fact an interested director. Moreover, because he is a Company insider he is, by legal definition, not disinterested and independent. In addition, through his actions, defendant D. Andreas controls and dominates the Board of Directors as follows:

(1) D. Andreas controlled and dominated the process by which each defendant director was selected for nomination or renomination to the ADM Board. D. Andreas and M.D. Andreas control the four members of the Board's nominating committee. Non-employee directors are paid an annual retainer fee of up to $100,000, more than twice the industry norm. Each defendant director therefore had a direct economic incentive to please D. Andreas and his top officers in order to stay on the Board of Directors.

(2) D. Andreas' ability to handpick his directors and control the Board is widely recognized. As a result of his ability to control and dominate the Board, D. Andreas was able to "stuff[] his board with family and friends and company officers and paid them more than twice the norm [to serve as ADM directors]." "Corporate Governance's Sorry History," *The Wall Street Journal*, April 18, 1996 page C2 column 3. By handpicking relatives, friends and ADM officers as ADM directors, D. Andreas has maintained complete control over the ADM Board of Directors. The ADM Board does nothing that D. Andreas does not want it to do including, causing the Company to engage in anti-competitive practices.

(3) D. Andreas' contempt for ADM's shareholders is evident. At its October 19, 1995, annual shareholders' meeting, D. Andreas displayed his lack of regard for the interests of ADM's shareholders by "shout[ing] down shareholders and order[ing] the audience microphones

turned off." When a pension plan official exclaimed, "this is telling us a lot about how this company is run," D. Andreas responded "[t]his meeting, sir, runs according to *my* rules." "A Grain Of Activism At Archer Daniels Midland," *Business Week*, November 6, 1995 p. 44 (emphasis added). According to Dain Bosworth analyst Bonnie Wittenberg, ADM has "a corporate culture problem." "The ADM Tale Gets Even Stranger", *Fortune*, May 13, 1996, p. 113.

(4) As a result of D. Andreas' dominating position, ADM has been called "a public company that has been run as a family fiefdom." As Richard H. Koppes, deputy executive director of the California Public Employees' Retirement System (CalPERS), stated, the ADM Board needs a majority of "truly independent directors." For years, D. Andreas and ADM have ignored critics of their "insider-dominated" Board. CalPERS, prior to ADM's October 19, 1995 annual meeting, gave ADM the grade of "F" for ADM's failure even to respond to CalPERS's corporate governance queries. "A Grain Of Activism At Archer Daniels Midland," *Business Week*, November 6, 1995, p. 44.

(5) D. Andreas' business philosophy is "[t]he competitor is our friend, and the customer is our enemy." Because of D. Andreas' strong convictions he could and did succeed in causing the Board to approve of ADM's anti-competitive behavior which is now the subject of three grand jury investigations and numerous civil antitrust lawsuits. These facts indicate that defendant D. Andreas not only dominates and controls the Board but imposes a corporate policy that considers the shareholders of the Company children who should be seen and not heard. The Board and the Company is truly his fiefdom.

(b) Defendant M.D. Andreas, as executive vice president of ADM, Vice-Chairman of the Board of Directors and the son of D. Andreas, is in fact an interested direc-

tor. Moreover, because he is a Company insider he is, by legal definition, not disinterested and independent. In addition, M.D. Anreas directly paritcipated in ADM's antitrust violations and is a prime target of the government's investigation. Defendant M.D. Andreas, through his actions and position with the Company, including his position on the Board's nominating Committee, controls and dominates the Board of Directors.

(c) Defendant Randall, as president of ADM, is in fact an interested director. Moreover, because he is a Company insider he is, by legal definition, not disinterested and independent. In addition, defendant Randall has been directly implicated in ADM's antitrust violations and is a prime target of the government's investigation. Defendant Randall, through his actions and position with the Company, controls and dominates the Board of Directors.

(d) Defendant M.D. Andreas, as senior vice president of ADM, is in fact an interested director. Moreover, because he is a Company insider he is, by legal definition, not disinterested and independent.

(e) Defendant Hale is Chairman and CEO of ADM Milling Co., an ADM subsidiary. Hale is the fourth most highly paid ADM officer. By virtue of his executive position with the Company's subsidiary, he is an insider and, by legal definition, is not disinterested and independent.

(f) Defendant Webb is the Chairman and Chief Executive Officer of Growmark, Inc., a farmer-owned cooperative partly owned by ADM. Growmark, Inc. sells approximately one billion bushels of grain annually to ADM and owns approximately 2,025,600 shares of ADM stock. Defendant Webb is also Chairman of ADM/Growmark River Systems, Inc. Because of Webb's positions at the Growmark entities, which are closely tied financially to ADM, he is not disinterested and independent.

(g) Defendant Mulroney, a long time friend of defendant D. Andreas, is a senior partner in the law firm Ogilvy Renault, which has been retained in the past by ADM and received substantial fees for services rendered to ADM. Because of Mulroney's financial interest in his law firm's receiving legal fees and expecting to render legal services to ADM in the future, he is not disinterested and independent. In addition, while Mulroney was Canadian Prime Minister, the Canadian Bureau of Competition Policy, in two controversial decisions, first blocked the merger of two Canadian flour millers (who competed with ADM) and then allowed ADM to buy one of those millers.

(h) Defendant Strauss, is a named partner in the Washington, D.C. law firm Akin, Gump, Strauss, Hauer and Feld, which not only identified and turned in Mark E. Whitacre, but has continuously provided legal services to ADM and received substantial legal fees throughout the relevant period. Because of Straus' [*sic*] financial interest in his firm's having received legal fees in the past and expecting to render legal services to ADM in the future, he is not disinterested and independent. According to news reports, defendant Strauss told the Washington *Post*: "Dwayne Andreas just owns me . . . He captures the imagination of everybody he touches . . . My God, he's the ablest man in America." *Fortune*, August 21, 1995, p. 59.

(i) Defendant L. Andreas, a former president of ADM, is the brother of defendant D. Andreas, and the uncle of M.D. Andreas and M.L. Andreas. Because of his family relationship with these defendants, who all have disabling interests, defendant L. Andreas is controlled and dominated and, therefore, lacks any independence.

(j) Defendant Vanier, the brother-in-law of defendant Hale, has a beneficial interest in farms and ranches that sold $584,568 worth of crops to ADM during the fiscal

year ending June 30, 1995. Vanier is not disinterested because of his financial stake in continuing to do business with D. Andreas and ADM. In addition, because of his familial relationship with Hale, defendant Vanier is controlled and dominated and, therefore, lacks any independence.

(k) Defendant Archer is the father of C.P. Archer, an ADM insider by virtue of his position as company treasurer. Because of his close relationship with a corporate officer whose position is dependent on the controlling directors, D. Andreas, M.D. Andreas and Randall, defendant Archer is controlled and dominated and, therefore, lacks any independence.

(l) The remaining directors, Bruce, Rockefeller, Goldberg, Daniels, and Johnson are all longtime friends and colleagues of D. Andreas and each lacks any independence since they are controlled by D. Andreas, M.D. Andreas and Randall who each have disabling interests. The domination of the Board of Directors by the Controlling Directors has impaired the Board's ability to exercise its business judgment validly and rendered it incapable of reaching an independent decision as to whether or not to accept plaintiffs' demands.

B. Other Reasons Why The Directors Are Not Disinterested And Cannot Be Objective In Evaluating The Merits Of A Demand

29. Additional reasons for each individual director's lack of independence in considering a demand is by virtue of his or her participation in, approval of, and/or reckless disregard of the alleged wrongdoing. Therefore, each defendant is fatally interested in the outcome of any litigation brought against the ADM Board as a whole. Such profound interest is manifest as follows:

(a) the entire ADM Board of Directors participated in and/or were fully aware of the deliberative process

behind many of the acts of wrongdoing alleged herein. The ADM Board of Directors also either approved of, participated in or recklessly disregarded those instances of wrongdoing;

(b) the acts of wrongdoing, the ratification of which was improper and illegal, constitute violations of the fiduciary duties each ADM director owed to the Company and its shareholders. Therefore, a reasonable doubt exists that the Director Defendants exercised valid business judgment because their wrongful actions and/or inactions amounted to breaches of their fiduciary duties of good faith, disclosure, due care and loyalty to ADM and its shareholders, and an abdication of their responsibilities as directors, which breaches and abdication gave rise to ADM's liability for the illegal wrongdoing;

(c) the members of the ADM Board of Directors, by receiving payments, benefits, stock options and other emoluments by virtue of their positions and control of ADM, have benefited from the wrongdoing and have engaged, authorized and/or covered up such conduct to preserve their positions of control. The Board members also have close personal and business ties with each other as well (as set forth above) and, consequently are interested parties and cannot in good faith exercise independent business judgment to determine whether to bring this action against themselves.

(d) ADM's officers and directors are protected against personal liability for their acts of mismanagement and breach of fiduciary duty by directors' and officers' liability insurance. The Director Defendants caused the Company to purchase that insurance for their protection with corporate funds, *i.e.*, monies belonging to the stockholders of ADM. However, the directors' and officers' liability insurance policies covering the defendants in this case contain an "insured versus insured exclusion," a provision which eliminates coverage for any action brought directly

by ADM against the Director Defendants. As a result, if these directors were to sue themselves or certain of the officers of ADM, or to take over this suit and prosecute it, there would be no directors' and officers' insurance protection. The Director Defendants would subject themselves, their relatives and their friends and colleagues to a judgment in the millions of dollars that would be payable from their individual assets alone. This is a further reason why they will not bring such a suit, or would not prosecute any such action vigorously. On the other hand, if the suit is brought derivatively, as this action is brought, such insurance coverage exists and will provide a basis for the Company to recover for the Director Defendants' wrongdoing.

30. Plaintiffs have made no demand on stockholders of ADM to institute this action because such demand would be a futile and useless act for the following reasons:

(a) ADM is a publicly traded company with many thousands of stockholders;

(b) making demand on such a large number of stockholders would be impossible for plaintiffs who have no way of finding out the names, addresses or phone numbers of stockholders; and

(c) assuming all stockholders could be individually identified, making demand on all stockholders would force plaintiffs to incur huge expenses.

THE SPECIAL COMMITTEE AND CORPORATE GOVERNANCE COMMITTEE OF THE BOARD OF DIRECTORS

The Special Committee

31. The Director Defendants' failure to take any action on behalf of ADM prior to the filing of this derivative action constitutes further evidence that demand is futile. In response to the investigation by the Department of Justice ("DOJ"), the filing of the derivative lawsuits and

the class action lawsuits for violations of the federal securities and antitrust laws, on or about July 19, 1995, ADM's Board of Directors announced the formation of a Special Committee consisting of nine directors—Archer, Bruce, Goldberg, Johnson, Vanier, Webb and Rockefeller, with defendants Mulroney and Daniels as co-chairs. The Special Committee retained the law firm of Simpson, Thacher & Bartlett as counsel.

32. The Special Committee, according to an ADM press release, will "direct the Company's response to matters related to the government investigation of the high-fructose corn syrup, citric acid and lysine industries and certain related civil suits".

33. Professor John Coffee, a noted corporate governance expert at Columbia University Law School, has noted that ADM needs more than a special committee. Instead, Professor Coffee stated, it needs "a team of experts to lead a full-blown *independent* investigation," because "the allegations against ADM could not be more serious." "Checks, Lies and Videotape," *Fortune*, October 30, 1995 p. 109 at 112 (emphasis added).

34. Moreover, for the reasons set forth in paragraphs 28-29 above, the Special Committee is anything but independent. At least three of the directors on the Special Committee, including Mulroney who is a co-chair, have disabling personal and professional ties to D. Andreas. All have direct personal ties to D. Andreas. The members of the Special Committee are "outside directors" only to the extent that they are not employees of ADM. They do not conform to the Council of Institutional Investors definition of outside director, namely, a person whose only tie to the company is his or her directorship.

35. The Special Committee has yet to render its findings and recommendations. Any recommendation, other than one to prosecute each director for breaching his or her fiduciary duties to ADM and its shareholders, would

be a whitewash. Because the Special Committee is composed of interested, non-independent directors who were themselves involved in the alleged wrongdoing, such a recommendation will not be made. For that reason as well, any demand made on ADM's Board of Directors would be futile.

The Corporate Governance Committee

36. On or about October 21, 1995, the Board, in an attempt to muffle institutional shareholders' constant barrage of criticism aimed at the "family" run Board, created the Corporate Governance Committee, co-chaired by defendants Goldberg and Webb, to examine the Board's size, director, qualifications, ethics, compensation and other issues, including whether the Board has sufficient independence from management.

37. On or about January 15, 1996, the Corporate Governance Committee announced its recommendations, which would weaken the control of defendant D. Andreas and force the retirement of several directors with close ties to him. As reported in *The Wall Street Journal* on January 16, 1996, "[t]he committee's report surprised Wall Street because it signaled that *Mr. Andreas, who has run the* [*Company*] *in an autocratic style rare for a publicly traded company* may be bowing to shareholder pressure to overhaul the 17-member board" (emphasis added).

38. The report made several major recommendations with respect to the composition of the new Board, including that an outside director cannot be a current employee, a retired senior executive, the "close" relation of a senior manager, or someone who has a "personal" business or professional relationship with the Company.

39. Notwithstanding these changes, *The Wall Street Journal* stated that "it is far from clear how much influence Mr. Andreas will lose over the Board, *which hasn't seriously challenged his authority since he became chairman in 1972*". The Corporate Governance Committee's report acknowledges, through its recommendations, that the Board was and is completely controlled and dominated by D. Andreas and therefore lacks any true independence.

WRONGDOING BY THE OFFICER AND DIRECTOR DEFENDANTS

40. The Director Defendants, as corporate officers and directors, owed ADM the duty of due care in the performance of their responsibilities with respect to ADM's operations. Each of the Director Defendants in this action, acting individually or jointly, failed to exercise reasonable diligence and due care, was grossly negligent or reckless and committed, *inter alia*, one or more of the following actions or omissions constituting fraud, mismanagement and breaches of fiduciary duty:

(a) the Director Defendants authorized, caused or permitted ADM to engage in illegal activity including the violation of the federal antitrust and securities laws;

(b) the Director Defendants exposed the Company to financial injury by failing and refusing to institute legal action against those officers, directors and employees responsible for the illegal activity and for permitting ADM to engage in the improper, illegal and fraudulent practices described herein;

(c) the Director Defendants failed to take reasonable and adequate steps to preclude, prevent, investigate or correct the occurrence of illegal pricing practices at ADM;

(d) the Director Defendants failed to take reasonable and adequate steps to preclude, prevent, investigate or correct the making of illegal payments to foreign accounts for Company executives;

(e) the Director Defendants authorized, caused or permitted ADM to conduct its business in an unsafe, imprudent manner, concealing the true nature of their illegal

conduct to violate the federal antitrust, securities, and other laws and the likely serious adverse impact on ADM's financial condition and prospects;

(f) the Director Defendants failed to exercise independent judgment in the conduct of ADM's business and abdicated their responsibility for the management and supervision of the Company, allowing themselves to be controlled and dominated by defendant D. Andreas;

(g) the Director Defendants' conduct has damaged ADM by exposing it to the costs of defense and liability for violations of the federal antitrust and securities laws for, at least, $25 million; and

(h) the Director Defendants have damaged the goodwill and reputation of ADM due to the adverse publicity that they have generated by their actions. As a result, the Director Defendants have impaired ADM's ability to raise capital at a reasonable and/or low cost. The Company's credit rating has been adversely affected, and its cost of capital has, therefore, already increased.

BACKGROUND FACTS

41. ADM is a $12 billion corporate empire built, according to defendant D. Andreas, by "developing more expensive products from raw [agricultural] commodities and convincing the world it needed them." ADM's strategy is straightforward: to be a major player in all businesses it enters as well as the lowest-cost producer. ADM is one of the world's largest processors of corn, wheat and oilseeds, as well as a major procurer, transporter, processor and merchandiser of numerous other agricultural products. It has proclaimed itself the "supermarket to the world".

42. Corn refining is ADM's most profitable activity, accounting for approximately 55 to 70 percent of its yearly operating earnings. Among other things, the Company processes corn to produce citric acid and high fructose corn syrup ("HFCS"), which are food additives, and lysine, which is used in livestock feed. The Company's customers include many Fortune 500 companies, including most major United States food manufacturers.

43. ADM's business has grown in recent years driven, in part, by expansion of its HFCS business. The Company's Corn Processing Division, which is run by Terrance S. Wilson ("Wilson"), produces HFCS. HFCS became popular in the 1980s as an alternative to sugar and is used extensively as a sweetener in soft drinks, as well as in cakes, cookie mixes, candy bars and instant breakfast foods. With the recent rise in popularity of iced teas and fruit-flavored drinks, demand for HFCS has increased even more. The Company dominates the United States market for HFCS, maintaining an approximately 30 percent market share.

44. The Company has also experienced rapid growth in its BioProducts division, which was founded in 1989 to produce feed-grade amino acids, vitamins and antibiotics from corn starch and soybean meal. Up until very recently, the President of the BioProducts Division was Mark E. Whitacre ("Whitacre"), who joined the Company in 1989 and was generally considered to be the driving force behind the BioProducts Division's growth, as well as the likely successor to defendant Randall as President of the Company. Today, bioproducts represent approximately 15 percent of the Company's earnings, according to analysts.

45. The most important product of ADM's BioProducts Division is lysine, a corn-derived amino acid which is used in swine and poultry feed to promote the growth of lean muscle in animals. When the Company entered the lysine market in 1989, it was the only American producer of lysine and the market was dominated by two Japanese companies, Kyowa Hakko Kogyo and Ajinomoto. By the end of 1992, however, ADM had doubled its lysine production capacity to 250 million pounds per year, and

today it controls more than 50 percent of the $650 million worldwide market.

46. In addition to lysine, the BioProducts Division has thrived by producing citric acid which, like HFCS and lysine, ADM manufacturers from corn. ADM entered the citric acid market in 1990 through its purchase of a Pfizer, Inc. division. Citric acid is used heavily by the beverage industry as a flavor enhancer. It is also added to jams, jellies and candy to provide tartness; to frozen foods to help prolong shelf life; and to shampoos and hair-care products to control acidity.

ADM'S PRICE-FIXING

47. When ADM began its BioProducts Division in 1989, its objective was to become a world leader in the production of amino acids and other bioproducts. To accomplish that objective, the Company's first goal was to develop lysine "into massive business," as noted by Whitacre in an interview appearing in the September 4, 1995 issue of *Fortune* (the "*Fortune* Interview").

48. In order to develop its lysine business, ADM first attempted a "predatory pricing" strategy that it had previously used successfully. The strategy was to gain customers and market share quickly, even at the initial expense of profitability, by flooding the market with lysine at low prices with the intent that competitors would be driven out of the market. Once the Company had gained market share, it hoped to raise prices and earn profits.

49. This strategy was partially successful and, by 1992, the Company had gained more than thirty percent of the worldwide lysine market. The price war ADM initiated drove lysine prices down from approximately $1.30 pound to $.60 a pound, causing ADM and its competitors to lose millions of dollars every month. However, the keystone of the plan failed in that no competitors dropped out of the business.

50. Unable to make lysine production profitable through predatory pricing, the defendants determined that they could achieve profitability through another method—they would raise lysine prices by convincing ADM's competitors in the lysine business to agree to fix lysine prices at an artificially high level and allocate markets, thus allowing them all to reap undeserved and illegal profits.

51. Such anti-competitive and illegal practices were neither new to ADM, nor unique to its lysine business. As stated by Whitacre in the *Fortune* Interview, illegal price-fixing occurred in "four or five other divisions" and was "fairly common." Thus, prior to and during all times relevant to this Complaint, the Director Defendants and other executives at ADM were illegally fixing the prices and production volumes of citric acid and HFCS. According to Whitacre, defendant M.D. Andreas and other executives often quoted defendant D. Andreas' business philosophy as "the competitor is our friend, and the customer is our enemy."

52. The lysine price-fixing process began around February of 1992 when defendants M.D. Andreas and Randall instructed Whitacre to work more closely with Wilson so that Wilson could teach him some things "about how ADM does business." Wilson was notorious among ADM executives as the person who generally orchestrated the Company's price-fixing activities. As stated by Whitacre in the *Fortune* Interview, he understood Wilson's involvement with lysine to mean that they "were going to do business by the Terry method," meaning fixing the price of lysine with competitors.

53. Whitacre and Wilson met in February, 1992, to discuss the lysine business. During that meeting, Wilson told Whitacre that he wanted to meet with ADM's competitors "because we were losing several million dollars a month." He also told Whitacre "[w]e're not blaming that on you. Obviously we needed to get market share

first, and that's what we did. That was stage one. But now we need to take the business to a different tier."

54. In April, 1992, Whitacre and Wilson held meetings in Tokyo with representatives from ADM's two biggest Japanese competitors in the lysine business, Kyowa Hakko Kogyo and Ajinomoto. The purpose of that meeting was to determine whether their competitors were interested in entering into a conspiracy to fix prices.

55. A few months later, in June, 1992, Wilson and Whitacre again met with ADM's Japanese competitors. During that meeting, Wilson gave a presentation in which he discussed how ADM's entry into the lysine market had resulted in production capacity 20% to 25% greater than current usage levels, and that this overcapacity had resulted in prices being driven down from $1.30 per pound to $.60 per pound. He also explained how this drop in price resulted in a $200 million loss in revenues. He stated: "well, gentlemen, there's $200 million that we're giving to our customers. In other words, the customer is benefitting, not the people who spent hundreds of millions of dollars building these plants." Wilson then repeated the ADM philosophy of "the competitor is our friend, and the customer is our enemy."

56. Over the next several months the Director Defendants authorized, carried out and acceded to a scheme, in conjunction with the Company's competitors in the lysine market, including Kyowa Hakko Kogyo, Ajinomoto and others, to fix the worldwide price and market share of lysine, in violation of the federal antitrust laws.

57. In connection therewith, Whitacre and Wilson, under the direction of defendants M.D. Andreas and Randall, held numerous meetings with ADM's competitors in various locations all over the world. Most of ADM's high-level management were aware of these meetings and what transpired therein. For example, Richard P. Reising, the Company's General Counsel, who sometimes prepare for these meetings, was once quoted as saying to

Whitacre and Wilson as they were departing for a meeting, "Hey, guys, good luck with your price-fixing meeting."

58. During these meetings, the companies entered into collusive, anti-competitive agreements to fix lysine prices and market share worldwide at artificial levels in order to reap illegal profits. For example, one method they used was to set monthly sales targets for each company as a means of artificially limiting supply and thereby maintaining an inflated price. Through these anti-competitive agreements, the Director Defendants caused ADM and the other companies to knowingly violate the federal antitrust laws.

59. Prior to and throughout all times relevant hereto, the Director Defendants caused ADM to engage in collusive, anti-competitive volume and price-fixing schemes and other anti-competitive activities with its competitors in the citric acid and HFCS businesses.

60. With regard to citric acid and HFCS, ADM's illegal activities were also orchestrated by, and with the approval of, ADM's Board of Directors. Wilson attended meetings around the world with senior officials of competing citric acid producers, including Hoffman-LaRoche, Inc. and Bayer AG. During these meetings, the companies entered into collusive, anti-competttiive agreements to fix worldwide citric acid prices and market share at artificial levels.

61. Through these activities, ADM and its competitors were able to fix the worldwide production volumes and prices of citric acid and HFCS at artificial levels, and thus reap illegal profits, in knowing violation of the federal antitrust laws.

THE FEDERAL INVESTIGATION

62. On or about June 27, 1995, agents of the Federal Bureau of Investigation ("FBI") and the Antitrust Division of the DOJ, armed with subpoenas seeking docu-

ments and records regarding the Company's citric acid, HFCS and lysine operations to be used in connection with their investigation of ADM's anti-competitive activities, visited the homes of numerous ADM executives and managers. Several carloads of agents also went to ADM's corporate headquarters.

63. The next day, ADM released a terse, two-sentence statement that a federal grand jury in Chicago was investigating "possible violations of federal antitrust laws and related crimes in the food additives industry." The Company also indicated that it had been served with a search warrant and subpoenas for documents and testimony concerning its marketing practices. The statement failed, however, to disclose the magnitude of the investigation, that it was commenced because of a tip from one of ADM's senior corporate executives, Whitacre, or that the investigation had been on-going since 1992.

64. According to an article published on July 10, 1995, in *The Wall Street Journal*, Whitacre approached the FBI in 1992 after he had been asked by an ADM executive to participate in a pricing arrangement, involving the ADM products lysine and citric acid that he believed was collusive. Whitacre produced information indicating that ADM had engaged, and was engaging, in collusive pricing practices. The *Journal* reported that Whitacre had been an undercover operative for the FBI for the past three years and had secretly assisted the government in making hundreds of tape recordings of ADM's anti-competitive and illegal volume and price-fixing activities.

65. Recently, it was reported in the May 13, 1996 edition of *Fortune*, the DOJ had struck a bargain with another ADM executive who knew about the price fixing of lysine and promised him immunity in exchange for his testimony.

66. In addition, the *Journal* further disclosed that, as a result of the investigation, defendant Buffett had re-

signed from ADM's Board of Directors the prior week "because he was troubled by the investigation and the way the Company was handling it," and because he had "lost confidence in whether he was being accurately informed by other [ADM] executives about the details of the antitrust matter."

67. The price of ADM common stock had dropped approximately 15% from $18.625 per share on June 26, 1995, the day before the FBI entered the corporate offices of ADM and the homes of ADM officers and employees, to $14.28 per share on July 10, 1995, the date on which the *Journal* article was published. As a result of the disclosures and the drop in the price of ADM's stock, several shareholders of the Company filed suits alleging violations of the federal securities laws.

68. In the wake of the announcements regarding the government's antitrust investigations, numerous purchasers of ADM products have filed individual and class civil antitrust suits throughout the country alleging that ADM engaged in illegal anti-competitive practices.

69. Recently, the Company announced that it had entered into a settlement, subject to court approval, of the civil lysine case in which it agreed to pay *$25 million*. This settlement is to be paid directly by the Company and not by any insurance. Additionally, the Company recently disclosed in court papers filed in the lysine case that it had increased its reserve for litigation from $16 million to *$31 million*.

ADM'S SLUSH FUNDS

70. According to Company statements, huge sums of the Company's monies have been paid into foreign bank accounts for the benefit of senior officers and managers of the Company. According to the August 22, 1995 edition of *USA Today*, ADM routinely rewarded top executives with foreign pay deposited in overseas ac-

counts. Whitacre sent a letter to *The Wall Street Journal* that appears to acknowledge that he was the recipient of money from ADM through unusual means. He wrote that "[r]egarding overseas accounts and kick-backs, and overseas payments to some employees, . . . Dig deep. Its there! They give it, then use it against you when you are their enemy." When asked to comment on this allegation, an ADM official declined to comment.

COUNT I

DERIVATIVE CLAIM AGAINST ALL DEFENDANTS FOR INTENTIONAL BREACH OF FIDUCIARY DUTIES

71. Plaintiffs incorporate by reference and reallege paragraphs 1 through 70 above as though set forth fully herein.

72. The Director Defendants are fiduciaries of ADM and all of its public shareholders and owe to them the duty to conduct the business of the Company loyally, faithfully, carefully, diligently and prudently. This count is asserted based upon the Director Defendants' acts in violation of Delaware common law, which acts constitute the intentional breach of fiduciary duty.

73. The Director Defendants, in their roles as executives and directors of the Company, participated in the acts of mismanagement alleged herein, or acted in reckless disregard of the facts known to them, and failed to exercise due care to prevent the Company from engaging in illegal acts, including M.D. Andreas' and Randall's active role in the price-fixing of ADM products, violating the federal securities and antitrust laws and creating slush funds for its top executives. The Director Defendants thereby intentionally and deliberately breached their duties of care, loyalty, accountability and disclosure to the shareholders of the Company by failing to act as an ordinarily prudent person would have acted in a like position.

74. The Director Defendants have been responsible for the gross mismanagement of ADM in connection with the price-fixing of its major products and violations of the federal securities laws. The Director Defendants abdicated their corporate responsibilities, by mismanaging the Company in at least the following ways:

(a) they subjected the Company to a Department of Justice investigation for alleged price-fixing violations of the federal antitrust laws;

(b) they caused the Company to engage in the unlawful price-fixing, which has resulted in numerous private civil antitrust suits throughout the county brought by purchasers of its corn processing products; and which has already resulted in the proposed settlement in the lysine civil case in which ADM agreed to pay $25 million, which will not be paid by any insurance policy;

(c) they concealed from the Company's shareholders and the investing public the true nature and extent of the problems that the Company was suffering, including the misrepresentation of the Company's financial statements, thus causing the Company to violate the federal securities laws and subjecting the Company to shareholder suits;

(d) they subjected the Company to a federal grand jury investigation of former and current Company executives for receiving payments from ADM to avoid taxes or for other improper and/or illegal purposes; and

(e) they subjected ADM to adverse publicity and damage to goodwill, which has greatly increased ADM's costs to raise capital and impaired its earnings.

75. The Director Defendants' wrongful conduct is a result of, among other things, their failure to maintain a system of internal controls adequate to insure the Company's compliance with the federal antitrust and securities laws. The Director Defendants' conduct has and will continue to cause considerable damage to ADM.

76. All of the Director Defendants, singly and in concert, engaged in the wrongful conduct in the intentional breach and/or reckless disregard of their fiduciary duties to the Company and its shareholders and conspired to, and did, abuse the control vested in them by virtue of their high-level positions in the Company.

77. ADM and its shareholders have been injured by reason of the Director Defendants' intentional breach and/or reckless disregard of their fiduciary duties to the Company. Plaintiffs, as shareholders and representatives of ADM, seek damages and other relief for the Company.

COUNT II

DERIVATIVE CLAIM AGAINST ALL DEFENDANTS FOR NEGLIGENT BREACH OF FIDUCIARY DUTIES

78. Except to the extent plaintiffs allege intentional or reckless misconduct by any defendant, plaintiffs incorporate by reference and reallege paragraphs 1 through 70 above as though set forth fully herein.

79. The Director Defendants engaged in the aforesaid conduct without exercising the reasonable and ordinary care owed to the Company by its directors, officers, managing agents and employees.

80. ADM and its shareholders have been injured by reason of the Director Defendants' negligent breaches of their fiduciary duties. Plaintiffs, as shareholders and representatives of ADM, seek damages and other relief for the Company.

COUNT III

DERIVATIVE CLAIM AGAINST THE DIRECTOR DEFENDANTS FOR ABUSE OF CONTROL

81. Plaintiffs incorporate by reference paragraphs 1 through 70 above as though set forth fully herein.

82. The Director Defendants' conduct constituted an abuse of their control of and influence over ADM for which they are legally responsible.

83. By reason of the foregoing, ADM has been damaged.

COUNT IV

DERIVATIVE CLAIM AGAINST THE DIRECTOR DEFENDANTS FOR GROSS MISMANAGEMENT

84. Plaintiffs incorporate by reference paragraphs 1 through 70 above as if fully set forth herein.

85. As detailed more fully herein, the Director Defendants had a duty to ADM and its stockholders to prudently supervise, manage and control ADM's operations.

86. These defendants, either directly or through aiding and abetting, abandoned and abdicated their responsibilities and duties to prudently manage the assets of ADM in a manner consistent with the operations of a publicly held corporation.

87. By acting as alleged herein, the Director Defendants breached their duties of due care and diligence in the management and administration of ADM's affairs and in the use and preservation of ADM's assets.

88. As a proximate result thereof, ADM has been damaged.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs demand judgment on behalf of ADM as follows:

A. Against each defendant for restitution and/or damages in favor of plaintiffs, on behalf of ADM and its public stockholders, and awarding punitive and exemplary damages as appropriate, plus pre-judgment interest;

B Extraordinary equitable and/or injunctive relief as permitted by law, equity and state statutory provisions sued hereunder;

C. Awarding plaintiffs the costs and disbursements of this action, including reasonable attorneys', and experts' fees; and

D. Awarding such other relief as the Court may deem just and proper.

Plaintiffs hereby demand a trial by jury.

DATED: May 17, 1996

By: /s/ Terry Rose Saunders
One of the Attorneys
for Plaintiffs

[Counsel Listing Omitted]

[Verifications Omitted in Printing]

[Filed Jun. 7, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

[Caption Omitted in Printing]

DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED AND AMENDED DERIVATIVE COMPLAINT FOR FAILURE TO MAKE DEMAND AND FAILURE TO STATE A CLAIM

Defendants move the Court to enter an order dismissing plaintiffs' Consolidated Amended Derivative Complaint pursuant to Fed. R. Civ. P. 23.1.

1. The present action was instituted on or about July 13, 1995, in the United States District Court for the Northern District of Illinois. A notice of intent to file a "Proposed Consolidated and Amended Derivative Complaint" was filed in the Northern District of Illinois on Sept. 29, 1995.

2. This action was transferred to this Court on or about November 16, 1996.

3. Defendants filed a motion to dismiss plaintiffs' original consolidated complaint on December 27, 1995.

4. At the hearing on defendants' motion to dismiss on April 26, 1996, the Court dimissed plaintiffs' action for failure to file a verified complaint, giving plaintiffs leave to refile.

5. Plaintiffs filed their Consolidated and Amended Derivative Complaint ("Amended Complaint" or "Amended Compl." on May 17, 1996. In the Amended Complaint, plaintiffs allege that members of the board of directors

("the Individual Defendants") of nominal defendant Archer Daniels Midland Co. ("ADM") breached their fiduciary duty to shareholders by participating in or recklessly disregarding antitrust violations in three product areas (lysine, high fructose corn syrup, and citric acid). Amended Compl. ¶¶ 40-69. Plaintiffs also allege that the Individual Defendants authorized or approved illegal payments to ADM executives. *Id.* ¶¶ 70, 73.

6. Plaintiffs request the following relief: (i) damages on behalf of "ADM and its public stockholders" against the Individual Defendants; (ii) equitable and injunctive relief; and (iii) costs and attorneys' fees. *Id.*

7. Plaintiffs' Amended Complaint must be dismissed because plaintiffs failed to make a demand on the board of directors pursuant to Fed. R. Civ. P. 23.1 before filing this action.

8. In addition, plaintiffs have failed to show that demand was excused on grounds that it would be futile. Plaintiffs have failed to allege particularized facts that would raise a reasonable doubt that a majority of ADM's board was incapable of impartially considering a demand due to self-interest or lack of independence.

9. Defendants request oral argument to present fully the issue of why plaintiffs were required to make a pre-suit demand on the board of directors, and why their failure to do so requires dismissal.

WHEREFORE, the defendants pray that this Court dismiss plaintiffs' Consolidated and Amended Derivative Complaint for failure to comply with the demand requirement set forth in Fed. R. Civ P. 23.1.

[Counsel Listing Omitted]

DATED: June 7, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

SUPPLEMENT TO CONSOLIDATED AND AMENDED DERIVATIVE COMPLAINT

Plaintiffs hereby supplement their Consolidated and Amended Derivative Complaint as follows:

1. The following Paragraph 5A is inserted immediately after Paragraph 5:

5A. On October 15, 1996, ADM entered into a "Plea Agreement" with the United States Department of Justice in which ADM admitted to violating Section 1 of the Sherman Act, 15 U.S.C. § 1 and agreed, among other things, to pay a $100 million criminal fine. In addition to agreeing to pay $25 million to settle the lysine civil antitrust case, on September 27, 1996 ADM announce that it has agreed to pay $35 million to settle the citric acid civil antitrust case and to pay $30 million to settle a class action brought by ADM stock purchasers alleging federal securities law violations.

2. The following paragraphs 69A and 69B are inserted immediately after paragraph 69:

69A. On October 15, 1996, ADM entered into a "Plea Agreement" with the Department of Justice in which ADM agreed to plead guilty and pay a $100 million criminal fine—the largest criminal antitrust fine in U.S. history—for fix-

ing prices in the lysine market from June, 1992 through June 27, 1995 and for fixing prices in the citric acid market from January, 1993 through June 27, 1995. Pursuant to the guilty plea, ADM agreed to cooperate with the United States in current federal investigations of: (i) any antitrust schemes involving ADM's BioProducts Division, ADM's Animal Health and Nutrition Division, ADM's Food Additives Division or ADM's Sweetener Group; (ii) the acquisition by ADM of certain technology which is the subject of federal investigations in the Central District of Illinois and the Southern District of Alabama; and (iii) any investigation or proceedings arising from such investigations to which the U.S. is a party. ADM also agreed in its Plea Agreement to use its best efforts to secure the cooperation of any current director, officer or employee of ADM (other than Michael D. Andreas and Terrance S. Wilson), including making such persons and their documents available in the U.S., at ADM's expense, for service of process, interviews (except for defendants Dwayne Andreas and James Randall) relating to a pending indictment or information, grand jury testimony and trial testimony. In return, the U.S. agreed, among other things, not to bring criminal charges against any current director, officer or employee of ADM (other than Michael D. Andreas and Terrance S. Wilson) for any act or offense committed in furtherance of, or in connection with, the matters covered in the investigations referred to above.

69B. On September 27, 1996, ADM announced that it had agreed to pay $35 million to settle the citric acid civil antitrust case and to pay $30

million to settle a class action brought by ADM stock purchasers alleging violations of the federal securities laws. Both settlements are subject to court approval. These settlements are also to be paid directly by the Company and not by any insurance. In connection with the fines and settlements, ADM announced a $174 million charge to earnings for the quarter ended September 30, 1996.

[Counsel Listing Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

AMENDMENT AND SUPPLEMENT TO CONSOLIDATED AND AMENDED DERIVATIVE COMPLAINT

Plaintiffs, by their attorneys, amend and supplement their Consolidated and Amended Derivative Complaint, as previously supplemented, to allege a new Count V against all Director Defendants except Howard G. Buffett relating to the acts and transactions previously alleged, as follows:

ADDITIONAL FACTS

The following Paragraph 69C is inserted immediately after Paragraph 69B:

69C. On December 3, 1996, M.D. Andreas, Terrance S. Wilson, former ADM Group Vice President and President of ADM's Corn Processing Division, and Mark E. Whitacre, former ADM Corporate Vice President and President of ADM's BioProducts Division, were indicted for conspiracy to fix prices and allocate sales volumes of lysine. The indictment lists eleven meetings between June, 1992 and June, 1995, and refers to numerous additional telephone conversations and other discussions between defendants and co-conspirators at which the prices and volumes of sales of lysine sold worldwide were discussed

and agreed to, and charges the defendants and co-conspirators with having taken steps to implement, monitor and police the unlawful price-fixing agreements.

COUNT V

DERIVATIVE CLAIM AGAINST ALL DIRECTOR DEFENDANTS EXCEPT HOWARD G. BUFFETT FOR BREACH OF FIDUCIARY DUTIES

88. Plaintiffs reallege and incorporate by reference paragraphs 1 through 70 as though fully set forth herein.

89. The Director Defendants are fiduciaries of ADM and all of its public shareholders and owe to them the duty to conduct the business of the Company loyally, faithfully, carefully, diligently and prudently. This Count is based upon the acts of the Director Defedants, other than defendant Buffett, in violation of Delaware common law, which acts constitute a breach of these defendants' fiduciary duty of loyalty, involve knowing or intentional misconduct, or were not in good faith.

90. The Director Defendants owed ADM and its stockholders the duty to investigate promptly charges of criminal conduct by ADM executives, evaluate objectively the evidence against Company officials and act to minimize ADM's exposure to criminal penalties that could result from ADM's antitrust violations. Faced with substantial evidence of high-level wrongdoing—particularly FBI videotapes of price-fixing meetings attended by defendant M.D. Andreas and Terrance S. Wilson, then ADM Group Vice President and President of ADM's Corn Processing Division—they had the duty to take all necessary steps to demonstrate that the Company intended to remedy, prevent reoccurence of and seek redress for any wrongdoing on the part of company officials.

91. The Director Defendants named in this Count, in their roles as executives and directors of the Company, participated in the acts of mismanagement alleged herein, or acted in reckless disregard of the facts known to them. They breached their fiduciary duties of care and loyalty by failing to conduct a thorough and objective investigation of wrongdoing and, in the face of the substantial evidence the government had accumulated, by refusing to cooperate with or assist the Department of Justice in connection with the government's investigation of the Company executives—particularly M.D. Andreas and Terrance S. Wilson. The Director Defendants' conduct was designed to, and did, serve the interests of the Andreas family at the expense of ADM and its shareholders. The Defendants' improper behavior includes, but is not limited to, the following:

(a) Upon learning of the government's investigation, ADM executives determined to withhold information from the public. The Director Defendants went along with this policy. Indeed, former director and officer Howard G. Buffett resigned his positions one week after the June 27, 1995 FBI subpoenas became public "because he was troubled by the [government's] investigation and the way the Company was handling it," and because he had "lost confidence" in whether ADM executives were telling him the truth. (*See* paragraph 66, above.)

(b) ADM's Board of Directors delegated responsibility for ADM's response to the government's investigation to a Special Committee of the Board composed of friends and associates of D. Andreas. (*See* paragraphs 31-34, above.) This Committee was more concerned about protecting the Andreas family's interests than in ensuring that the thorough and impartial investigation necessary to protect the interests of the Company and its shareholders was conducted

immediately. Members of the Committee delayed and failed to take any steps against ADM officers accused of participating in the conspiracy and, instead, publicly criticized the FBI. For example, in October 1995, Special Committee member F. Ross Johnson delivered a widely publicized speech at Emory University, in which he stated:

> It turned out . . . that the FBI, who have got some good scumbags in there too—its almost a criminal mentality [he snickers]—he came in and got the goods on this guy [Whitacre] in one way or another, and for immunity [in Jan., 1993, he] signed this great long agreement . . . They [FBI] like to extort. Their technique is to get the gun on somebody and then put the pressure on. And then that puts the pressure on somebody else.

(*Wall Street Journal*, October 12, 1995; *Fortune*, October 30, 1995.)

(c) The Director Defendants' immediate reaction to allegations of price fixing was to investigate Whitacre, the President of the BioProducts Division who had become an FBI informant. In order to discredit the government's antitrust investigation, ADM moved quickly to build a case against Whitacre for embezzling funds (which Whitacre claimed to have received pursuant to a Company income tax evasion scheme) and terminated Whitacre and two other executives. (*Wall Street Journal*, August 21, 1995, September 25, 1995 and March 27, 1996; *New York Times*, September 27, 1995.)

(d) At the same time, however, the Director Defendants took no action against M.D. Andreas (only son and expected successor of D.O. Andreas) and Terrance S. Wilson, who were permitted to remain in their positions, and given raises, although de-

fendants knew that they were targets of a federal grand jury investigation and that indictments were being considered. After ADM entered into a plea agreement, ADM announced that Wilson had taken "early retirement", and M.D. Andreas had taken "temporary administrative leave." M.D. Andreas and Wilson, as well as Whitacre, were indicted on December 3, 1996 for their participation in the lysine price-fixing conspiracy.

(e) As evidence of wrongdoing continued to mount and after the outside directors had been briefed on the contents of the FBI's incriminating videotapes, they continued their "united front" in fighting the government. (*Wall Street Journal,* March 27, 1996.)

(f) Shortly after the government's investigation became public, ADM's co-conspirators in the lysine price-fixing scheme recognized that the government had "accumulated substantial evidence" and began quietly talking to the government about possible cooperation. ADM, however, in the words of one co-conspirator," was railing regularly in the press against the government's investigation in general and the manner in which the informant was used in particular." (*See* Transcript of October 18, 1996 proceedings in *United States v. Ajinomoto Co., Inc.* at 9.)

(g) In response to the January, 1996 report by ADM's corporate governance committee, the Director Defendants reduced ADM's board from seventeen to twelve members and nominated new directors. However, rather than nominating a truly independent Board to ensure that appropriate steps were taken to remedy wrongdoing and restore public confidence, the Director Defendants continue to serve on the Board and have failed to add strong independent directors to counterbalance the influence of D.O. Andreas. Indeed, one of the new directors is Ms. Mollie

Hale Carter, daughter of outgoing director H.D. Hale. Not surprisingly, ADM's institutional shareholders maintain that the board still lacks independence, and, at the October 17, 1996 annual meeting, 42% of the stock was voted in favor of a resolution to compel ADM to form a board consisting of a majority of directors meeting a more stringent definition of independence than ADM's current definition.

91. The failure of the Director Defendants to react appropriately to the charges of wrongdoing is the result of the dominance that D.O. Andreas exercises over the Board. ADM's board continues to be criticized for its lack of independence and only recently was ranked as the worst board in corporate America by *Business Week* in an evaluation reflecting opinions of shareholders and corporate governance experts. ADM's institutional investors believe that ADM's directors, "co-opted by family ties, business links, and longstanding friendships, put shareholder interests behind those of [Dwayne] Andreas." (*Business Week,* "The Best & Worst Boards", November 25, 1996, at 82.)

92. The continued refusal of the Director Defendants to take steps necessary and appropriate to limit ADM's exposure to severe criminal fines and penalties was further evidenced by the Company's September 1996 personal mailing to its shareholders of copies of *Washington Times* articles that called the government's case a "frame-up" designed to meet the Justice Department's quota for white-collar crimes and "fabricated" and accused the U.S. Government of "teaming up" with ADM's more cooperative foreign competitors whose testimony was "obviously tainted." According to Columbia Law School professor John C. Coffee, Jr., "One impact of this kind of conduct is that it will injure the shareholders by possibly precluding the company from claiming acceptance of responsibility." (*New York Times,* September 13, 1996.)

93. The injury that the conduct of the Director Defendants caused ADM and its shareholders is evidenced by the severity of ADM's fines as compared to treatment recommended for ADM's co-conspirators Ajinomoto Co., Inc. and Sewon America, Inc. During the October 18, 1996 hearings on these co-conspirators' plea and sentencing agreements, the government stressed that the co-conspirators had cooperated early and had assisted the government in its investigation.

> (a) With respect to Sewon America, Inc., the government agreed to file a motion to ask the court to depart from Section 8C2.7 of the federal sentencing guidelines "because of the defendant's substantial assistance to the investigation of other individuals and corporations for violation of federal criminal laws." (Transcript of October 18, 1996 proceedings in *United States v. Sewon America, Inc.*, at 9.)
>
> (b) With respect to Ajinomoto Co., Inc., the government stated, "Ajinomoto did cooperate with the government early in this investigation, and the value of their cooperation has been acknowledged publicly . . . The value of their cooperation we believe was taken into account fully in the sentencing agreement. We are going to be recommending a sentence of a $10 million fine." (Transcript of October 18, 1996 proceedings in *United States v. Ajinomoto Co., Inc.*, at 4). The Government further emphasized that Ajinomoto's "cooperation was timely, early and valuable." (*Id.* at 21.)

95. In contrast to the cooperating defendants for whom the government recommended a lesser fine, ADM, was required to pay a fine of $100 million—the largest antitrust penalty ever—in return for the government's acceptance of a guilty plea. This harm was caused by the Director Defendants' refusal to cause ADM to cooperate with the government or to demonstrate a willingness to take remedial steps against M.D. Andreas and Terrance S. Wilson, who were known to be targets of a federal grand jury investigation.

96. The Director Defendants, singly and in concert, engaged in the wrongful conduct in breach of their fiduciary duties to the Company and its shareholders; and conspired to, and did, abuse the control vested in them by virtue of their high-level positions in the Company.

97. ADM and its shareholders have been injured by reason of the Director Defendants' breaches of their fiduciary duties to the Company, as alleged above. Plaintiffs, as shareholders and representatives of ADM, seek damages and other relief for the Company.

WHEREFORE, plaintiffs demand judgment on behalf of ADM as follows:

A. Against each defendant for restitution and/or damages in favor of plaintiffs, on behalf of ADM and its public stockholders, and awarding punitive and exemplary damages as appropriate, plus pre-judgment interest;

B. Extraordinary equitable and/or injunctive relief as permitted by law, equity and state statutory provisions sued hereunder;

C. Awarding plaintiffs the costs and disbursements of this action, including reasonable attorneys', and experts' fees; and

D. Awarding such other relief as the Court may deem just and proper.

DATED: December 6, 1996

[Counsel Listing Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

AGREED MOTION FOR AN ORDER PRELIMINARILY APPROVING SETTLEMENT, SCHEDULING A FINAL SETTLEMENT HEARING AND DIRECTING THAT NOTICE BE GIVEN TO THE SHAREHOLDERS OF ARCHER DANIELS MIDLAND COMPANY

Plaintiffs, by their counsel, move, pursuant to Fed. R. Civ. P. 23.1, for an order (a) preliminarily approving the settlement of the derivative claims asserted in this action; (b) scheduling a hearing to consider final approval of the settlement and Plaintiffs' counsel's request for an award of fees and expenses; and (c) authorizing the form and manner of notice to be given to Archer Daniels Midland Company's shareholders. In support of this motion, Plaintiffs state as follows:

1. This action was commenced in the United States District Court for the Northern District of Illinois and the Circuit Court of Cook County, Illinois in July 1995. Subsequently, the cases were transferred to and consolidated in this Court.

2. Plaintiffs' counsel and counsel for the Defendants and the Company have reached a proposed settlement with the Company and the Defendants that includes implementation of corporate governance measures and the payment on behalf of the Defendants of $8 million, a significant portion of which will be used by the Company in implementing the corporate governance measures. A copy of the Stipulation of Settlement is attached as Exhibit A.

3. The Settlement was achieved following Plaintiffs' counsel's substantial fact investigation, consultation with independent experts and certain of the Company's major institutional investors, and arm's length negotiations between Plaintiffs' counsel and counsel for the Company and the Defendants.

4. The settlement will confer substantial benefits on the Company and its shareholders and is within the range of possible approval by the Court.

WHEREFORE, Plaintiffs request that the Court enter an order:

(a) Granting preliminary approval of the settlement;

(b) Approving the proposed notice of settlement attached hereto as Exhibit B; directing that notice of the settlement in the form attached as Exhibit "B-1" be mailed to Class members; and directing that publication notice in the form attached as Exhibit "B-2" be published in the national edition of *The Wall Street Journal*.

(c) Approving the timetable for giving notice to the shareholders of Archer Daniels Midland Company and holding a hearing to consider approval of the settlement, as set forth in the Order Preliminarily Approving Settlement and Providing for Notice.

Respectfully submitted,

[Counsel Listing Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

STIPULATION OF SETTLEMENT

This Stipulation of Settlement (the "Stipulation"), dated as of May 29, 1997, is made and entered into by and among (i) the Plaintiffs in the Illinois Action and the Delaware Action on behalf of themselves, the shareholders of Archer Daniels Midland Company ("ADM" or the "Company") and derivatively on behalf of the nominal defendant ADM, (ii) the Director Defendants, and (iii) nominal defendant ADM (collectively the "Parties"), as those terms are defined herein, by and through their counsel of record in the Actions. The Stipulation is intended by the Parties to fully, finally and forever resolve, discharge and settle the Settled Claims (as defined herein), upon and subject to the terms and conditions hereof.

I. THE LITIGATION

This litigation was commenced in July 1995, with the filing of shareholder derivative actions in the United States District Court for the Northern District of Illinois, the Circuit Court of Cook County, Illinois and the Delaware Court of Chancery (the "Delaware Court"). The actions filed in Illinois were transferred to the United States District Court for the Central District of Illinois (the "District Court"), and Plaintiffs filed a Consolidated and Amended Derivative Complaint, entitled *Paul Felzen, Trustee of Louise Laskin Trust - 1991 and Sandra Esner, Plaintiffs, v. Dwayne O. Andreas, et al., Defendants, and Archer Daniel Midland Company, Nominal Defendant,* Case No. 2279 (the "Illinois Action"). In November

1996, the Plaintiffs in the action brought in the Delaware Court filed an amended and consolidated complaint entitled *In Re Archer Daniels Midland Company Derivative Litigation,* Consolidated No. 14403 (the "Delaware Action"), to add allegations relating to events that occurred during 1996. Both the Illinois Action and the Delaware Action (the "Actions") named as defendants Dwayne O. Andreas, Ralph Bruce, John H. Daniels, Howard G. Buffett, Lowell W. Andreas, James R. Randall, Michael D. Andreas, H.D. Hale, O. Glenn Webb, Martin Andreas, Margaretta Rockefeller, F. Ross Johnson, Ray A. Goldberg, John K. Vanier, Shreve M. Archer, Jr., M. Brian Mulroney, and Robert S. Strauss, and the Delaware Action also named Gaylord O. Coan as a defendant (the "Director Defendants"). The Actions alleged, among other things, that the Director Defendants breached their fiduciary duties owed to the Company and its stockholders by participating in improper conduct or failing to properly supervise the activities of certain employees of the Company who had engaged in improper conduct, including violations of federal antitrust laws and federal securities laws. The shareholders' derivative claims are sometimes referred to collectively as the "litigation".

Plaintiffs in the Illinois Action filed a Supplement to Consolidated and Amended Derivative Complaint on November 4, 1996 and an Amendment and Supplement to Consolidated and Amended Derivative Complaint on December 6, 1996 to add allegations relating to events that occurred after May 17, 1996.

II. PRETRIAL PROCEEDINGS AND DISCOVERY IN THE LITIGATION

A. *Defendants' Actions*

The Director Defendants and the Company have filed motions to dismiss the Actions. In their motions to dismiss, the Director Defendants and the Company argued that Plaintiffs failed to make a demand upon the directors

of ADM as required by Delaware law before bringing their action, that Plaintiffs failed to state a claim for relief against the Director Defendants and that, under Article Fourteenth of ADM's Certificate of Incorporation, defendants are not liable for any of the breaches of duty alleged in the Actions. Plaintiffs opposed the motions.

The District Court has not ruled on the motion to dismiss and has adjourned oral argument on the motion, pending a hearing by the Court at which this Stipulation and the settlement are to be presented. Similarly, the Delaware Court has not ruled on defendants' motion to dismiss. The Parties to the Delaware Action agree to advise the Delaware Court of the proposed settlement as soon as practicable and to hold in abeyance all proceedings other than those set forth in the MOU or Stipulation that are required to obtain Final Court Approval.

After the announcement of the federal government's investigation into the charges that ADM had violated the antitrust laws and the filing of these Actions and class action lawuits for violation of the federal securities and antitrust laws, ADM's Board of Directors appointed a Special Committee consisting of outside directors to "direct the Company's response to matters related to the government investigation of the high fructose corn syrup, citric acid and lysine industries and certain related civil suits." The Special Committee retained counsel to assist it.

After the Illinois Action and the Delaware Action were filed and the allegations reviewed, the Company undertook certain actions in the areas of corporate governance, employee conduct, compliance, and succession.

On October 21, 1995, ADM's Board of Directors created the Corporate Governance Committee, consisting of outside directors to examine the Board's size, director qualifications, independence from management, ethics, compensation and other issues. The Corporate Governance Committee reported its recommendations to the

Board on January 15, 1996, including recommendations establishing requirements for an independent Board. In the Spring of 1996, the Company announced that certain of its directors, including Michael D. Andreas, would not stand for re-election. Three new directors were elected to the Board at the annual meeting of shareholders in October, 1996. In April, 1997, the Company announced that Dwayne Andreas had retired from his position as CEO of the Company and that G. Allen Andreas, Jr. would become the CEO and a member of the Board. In addition, the Company announced the election of Ambassador Andrew Young to the Board and the retirement of Lowell Andreas from the Board.

B. *Discovery, Investigation And Research Conducted By Plaintiffs*

Counsel for Plaintiffs have conducted an extensive investigation during the prosecution of the Actions, including consulting with experts in the areas of corporate governance and economics, and with the Company's largest institutional investors, and reviewed and analyzed treatises, articles, and authoritative reports on corporate governance issues. In addition, Plaintiffs' Counsel reviewed and analyzed thousands of pages of documents produced by defendants, reviewed and analyzed the Company's public filings and press releases, and thoroughly analyzed and evaluated the facts supporting Plaintiffs' claims.

C. *The Settlement Negotiations*

Beginning in November, 1996, Co-Lead counsel for Plaintiffs in the Illinois Action and counsel for the defendants met and reached an agreement in principle under which the Company would implement certain procedures and measures for corporate governance. Subsequently, in order to obtain the global resolution of the Actions, there were further negotiations between Co-Lead Counsel for Plaintiffs in the Delaware Action and defend-

ants leading to additional provisions for corporate governance measures. These vigorous, arms-length negotiations culminated in the execution of the Memorandum of Understanding on May 29, 1997, including the terms reflected in Exhibit A to the Memorandum of Understanding and to this Stipulation.

III. DEFENDANTS' STATEMENT AND DENIALS OF WRONGDOING AND LIABILITY

Each of the Director Defendants has denied and continues to deny each and all of the claims and contentions alleged by Plaintiffs in the Litigation. Each of the Director Defendants expressly has denied and continues to deny all charges of wrongdoing or liability against him or her arising out of the conduct, statements, acts or omissions alleged, or that could have been alleged, in the Litigation. Each of the Director Defendants further asserts that at all material times, he or she acted in good faith and in a manner he or she reasonably believed to be in the best interest of ADM and its shareholders.

Despite their assertions, the Director Defendants have concluded that the further conduct of the Litigation would be protracted and expensive, and that it is desirable that the Litigation be fully and finally settled in the manner and upon the terms and conditions set forth in this Stipulation in order to limit further expense, inconvenience and distraction, to dispose of burdensome and protracted litigation, and to permit the operation of ADM's business without further expensive litigation and the distraction and diversion of ADM's executive personnel with respect to matters in issue in the Litigation.

Moreover, the Director Defendants recognize that the procedures and measures that are set forth in Exhibit A, and which the Company will implement as part of the Settlement, will provide substantial benefits and protections to the Company and its shareholders.

IV. CLAIMS OF THE PLAINTIFFS AND BENEFITS OF SETTLEMENT

The Plaintiffs believe that the claims asserted in the Litigation have merit. However, counsel for the Plaintiffs recognize the expense and length of continued proceedings necessary to prosecute the Litigation against the Director Defendants through trial and through appeals. Counsel for the Plaintiffs have taken into account the uncertain outcome and the risk of any litigation, especially complex derivative actions such as this Litigation, as well as the difficulties and delays inherent in such litigation. Counsel for the Plaintiffs have taken into account the strengths and uncertainties and the possible defenses to the claims asserted in the Litigation, including the defenses asserted by defendants in their motions to dismiss the Litigation, and the substantial benefits of corporate governance procedures and measures contained in the Settlement, as well as the benefit from the termination of the Litigation.

In light of the foregoing, counsel for the Plaintiffs believe that the settlement set forth in the Stipulation confers substantial benefits upon ADM and its shareholders and have determined that the settlement set forth in the Stipulation is in the best interests of ADM and its shareholders.

V. TERMS OF STIPULATION AND AGREEMENT OF SETTLEMENT

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the Plaintiffs (for themselves, the shareholders of ADM and derivatively on behalf of ADM), nominal defendant ADM, and each of the defendants, by and through their respective counsel or attorneys of record that, subject to the approval of the District Court, the Litigation and all Settled Claims shall be finally and fully compromised, settled and released, and the Litigation shall be dismissed with prej-

udice, upon and subject to the terms and conditions of the Stipulation, as follows:

A. *Definitions*

(a) "Actions" as utilized herein shall mean collectively the Delaware Action (as defined herein) and the Illinois Action (as defined herein).

(b) "Andreas" as utilized herein shall mean Michael D. Andreas, his heirs, executors, administrators, successors, assigns, agents, employees, attorneys, representatives, and any person or entity claiming by or through him.

(c) "Company" as utilized herein shall mean Archer Daniels Midland Company, a Delaware corporation, and its directors, officers, agents, employees, representatives, attorneys, insurers, successors, assigns, parents, subidiaries, partners, and affiliates, except said term shall not include Excluded Persons (as defined herein), Andreas (as defined herein), or Wilson (as defined herein).

(d) "Co-Lead Counsel for Plaintiffs", as utilized herein shall mean, in the Illinois Action (as defined herein) Robert M. Roseman, Spector & Roseman, P.C. and Terry Rose Saunders, Law Offices of Terry Rose Saunders; and in the Delaware Action (as defined herein) Susan Salvetti of Zwerling, Schacter & Zwerling, LLP; Robert I. Harwood of Wechsler Harwood Halebian & Feffer LLP, and Stanley Bernstein of Bernstein Liebhard & Lifshitz.

(e) "Delaware Action" as utilized herein shall mean those actions or litigation pending currently before the Delaware Court (as defined herein), following consolidation, as *In Re Archer Daniels Midland Company Derivative Litigation*, Consolidated No. 14403, and any appeals (interlocutory or otherwise) taken from those actions.

(f) "Delaware Court" as utilized herein shall mean the Delaware Court of Chancery wherein the Delaware Action (as defined herein) is currently pending, and any

court of review to which an appeal has been taken from the Delaware Action (as defined herein).

(g) "Director Defendants" as utilized herein shall mean the Individual Defendants (as defined herein) and Andreas (as defined herein).

(h) "District Court" as utilized herein shall mean the United States District Court for the Central District of Illinois wherein the Illinois Action (as defined herein) is currently pending.

(i) "Effective Date" as utilized herein shall mean the date upon which Final Court Approval occurs.

(j) "Escrow Account" as utilized herein shall mean a certain interest-bearing account with Hickory Point Bank and Trust in Forsyth, Illinois into which the Settlement Proceeds (as defined herein) have been deposited which account is subject to certain restrictions in order to effectuate its purpose as described herein. The Settlement Proceeds have been and shall continue to be invested in United States Treasury Securities having maturities no greater than seven (7) days, or their equivalent.

(k) "Excluded Persons," as utilized herein shall mean Mark E. Whitacre, Reinhard Richter, Sidney Hulse, and Marty Allison.

(l) "Final Court Approval" as utilized herein shall mean the acceptance by the District Court (as defined herein) of the Stipulation of Settlement (as defined herein), said District Court's determination that the settlement of the Actions is fair, reasonable, and adequate, said District Court's approval of said settlement, including dismissal with prejudice of the Illinois Action (as defined herein) against the Company (as defined herein) and the Individual Defendants (as defined herein), without the award of their costs or expenses, the dismissal with prejudice of the Delaware Action (as defined here-

in) against the Company (as defined herein) and the Individual Defendants (as defined herein) without the award of their costs or expenses, and the dismissal without prejudice of claims in the Actions (as defined herein) directed against Andreas (as defined herein), which claims shall become the sole property of the Company, and the affirmance on appeal of said dismissals without further appeal or by lapse of time no appeal or further appeal is available.

(m) "Illinois Action" as utilized herein shall mean that action or litigation pending currently before the District Court (as defined herein), following consolidation, as *Paul Felzen, Trustee of Louise Laskin Trust—1991 and Sandra Esner, Plaintiffs v. Dwayne O. Andreas, et al., Defendants and Archer Daniels Midland Company, Nominal Defendant*, Cause No. 95-2279.

(n) "Individual Defendants" as utilized herein shall mean all current and former members of the Board of Directors of the Company (as defined herein), identified or referred to in the Actions (as defined herein) except Andreas (as defined herein).

(o) "Judgment" as utilized herein shall mean the final Judgment and Order of Dismissal With Prejudice to be rendered by the District Court.

(p) "MOU" as utilized herein shall mean the Memorandum of Understanding entered into among the Parties as of May 29, 1997.

(q) "Net Settlement Proceeds" as utilized herein shall mean the Settlement Proceeds, less: (i) attorneys fees and expenses, (ii) costs of notice, and (iii) any other fees and expenses as may be authorized by the Court.

(r) "Notice" as utilized herein shall mean the Notice of Hearing on Proposed Settlement of Derivative Action, substantially in the form annexed hereto as Exhibit B-1.

(s) "Parties" as utilized herein shall mean Plaintiffs, Director Defendants and ADM in this Litigation.

(t) "Plaintiffs' Settlement Demands" as utilized herein shall mean those claims and demands contained within pleadings of the Plaintiffs in the Actions (as defined herein) together with certain alternative remedial measures and procedures, which, on the basis of investigation and analysis by legal counsel for the Plaintiffs, said legal counsel believed were sufficient to form a basis for exploration of a possible settlement of the Actions (as defined herein).

(u) "Preliminary Approval Order" as utilized herein means the Order Preliminarily Approving Settlement and Providing for Notice, substantially in the form attached hereto as Exhibit B.

(v) "Settled Claims" as utilized herein shall mean any and all causes of action, suits, demands, claims, matters and issues, whether known or unknown, which have been, could have been, or in the future might be asserted, advanced or alleged in any of the Actions (as defined herein) or in any court or arbitration proceeding (including, without limitation, any claims, actions or demands arising under any federal or state law relating to alleged fraud, breach of any duty, negligence, recklessness, violations of federal or state securities laws, violations of federal or state antitrust laws or otherwise) by or on behalf of the Company (as defined herein), by any shareholder of said Company derivatively on its behalf, or by any named Plaintiff in the Actions (as defined herein) on their own behalf or on behalf of any record or beneficial holder of the stock of the Company (as defined herein), whether individual, class, derivative, representative, legal, equitable, or any other type in any other capacity, which claims have arisen, could have arisen, arise now or hereafter arise out of, or relate in any manner to the allegations, transactions, matters or occurrences, representations, acts

or omissions, or any series thereof, involved, set forth, referred to, or related to any of the pleadings in the Actions (as defined herein) against the Company (as defined herein) and or any of the Individual Defendants (as defined herein), provided, however, that Settled Claims shall not include any claims which the Company may have against Andreas (as defined herein), Wilson (as defined herein), or the Excluded Persons (as defined herein), which claims shall be reversed to the Company in its sole discretion.

(w) "Settlement Proceeds" as utilized herein shall mean the sum of Eight Million Dollars (8,000,000) paid by or on behalf of the Director Defendants (as defined herein) to the Company (as defined herein) by placement thereof into the Escrow Account (as defined herein) within forty-eight (48) hours after execution of the MOU (as defined herein) by an authorized representative of the Company (as defined herein) which deposit thereof shall constitute the sole and exclusive liability of the Individual Defendants, and following said deposit, such liability will be terminated in its entirety except for payment of said Settlement Proceeds including interest earned thereon as set forth herein, subject to Section F, paragraph 2 of this Stipulation of Settlement. The Settlement Proceeds shall not be disbursed until Final Court Approval (as defined herein) and an order has been entered by the District Court directing disbursement consistent with this Stipulation of Settlement.

(x) "Stipulation of Settlement" or "Stipulation" as utilized herein shall mean this Stipulation of Settlement.

(y) "Wilson" as utilized herein shall mean Terrance B. Wilson, his heirs, executors, administrators, successors, assigns, agents, employees, attorneys representatives, and any person or entity claiming by or through him.

B. *The Settlement*

In consideration of the mutual covenants and agreements contained in this Stipulation, the Parties agree to the following:

1. Within sixty (60) days of Final Court Approval, the Company will implement the procedure set forth in Exhibit A to this Stipulation, which Exhibit is incorporated fully herein by reference.

2. In payment of the settlement set forth in this Stipulation, the Settlement Proceeds have been deposited in the Escrow Account on behalf of the Director Defendants pursuant to the terms of the MOU. Pending distribution pursuant to the terms of this Stipulation, the Settlement Proceeds will be held in the Escrow Account and remain invested in United States treasury securities having maturities no greater than seven (7) days, or their equivalent. The Settlement Proceeds shall not be disbursed until Final Court Approval and entry of an order by the District Court directing disbursement. The Settlement Proceeds shall be used to pay reasonable attorneys fees and expenses to legal counsel for the Plaintiffs as ordered by the District Court and reasonably and necessarily incurred costs and expenses associated with the provision of notice of any hearing scheduled by the Court in accordance with the Preliminary Approval Order.

3. Upon Final Court Approval, the Net Settlement Proceeds, and accrued interest thereon, shall be paid to the Company to pay expenses, costs, and legal fees incurred by the Audit Committee of the Board of Directors of the Company (the "Audit Committee"), at its discretion, for a period of at least three (3) years from the date of Final Court Approval, to satisfy its independent review responsibilities as set forth in Exhibit A, and for any training or educational efforts undertaken at the Audit Committee's direction.

4. Except as may be provided expressly herein and upon Final Court Approval, neither the Company nor the Director Defendants shall bear any other expense, damage, cost, liability, or fee in conjunction with any settlement or resolution of the Actions. No Director Defendant shall have any further liability in relation to the Actions whatsoever subject to Section F, paragraph 2 of this Stipulation.

5. All claims that the Company has against the Excluded Persons, and which the Company may have against Andreas and Wilson, are reserved to the Company and are not released by this Stipulation, nor are they Settled Claims.

C. *Attorneys' Fees and Costs*

Counsel for the Plaintiffs in the Actions may make application to the District Court for an award of attorney fees, expenses and costs. No application for an award of attorney fees, expenses, and/or costs shall be made in any other forum. The Company and the Director Defendants agree not to oppose an application(s) for an award of attorney fees, costs and expenses made to the District Court by Co-Lead Counsel for the Plaintiffs in the Illinois and Delaware Actions which does not exceed $3,920,000 of the Settlement Proceeds, plus interest. Any payment of an amount awarded by the District Court as fees, costs and expenses shall be made solely from the Settlement Proceeds, and shall not be made until Final Approval, and will be paid to Co-Lead Counsel for Plaintiffs in the Actions, as directed by the District Court, within three (3) business days after the District Court's order directing disbursement of the Settlement Proceeds.

D. *Preliminary Approval Order And Settlement Hearing*

1. Promptly after execution of the Stipulation, Co-Lead Counsel for Plaintiffs in the Illinois Action shall submit the Stipulation together with its Exhibits to the

District Court. The Parties in the Illinois Action shall jointly apply for entry of the Preliminary Approval Order, substantially in the form of Exhibit "B" hereto, requesting, *inter alia*, approval of the Settlement set forth in the Stipulation and approval for the mailing and publication of the Notice and Summary Notice to current shareholders of ADM which shall include the general terms of the Settlement set forth in the Stipulation, and the date of the Settlement Hearing. The Parties shall also request that, after notice is given, the District Court hold a hearing (the "Settlement Hearing") and approve the Settlement as set forth herein.

2. The Preliminary Approval Order shall specifically include provisions that, among other things, will:

a. Preliminarily approve the Stipulation and the Settlement set forth herein as being fair, reasonable and adequate to ADM and its shareholders;

b. Approve the form of Notice of Settlement ("Notice") (substantially in the form of Exhibit B-1 hereto) for mailing to current shareholders of ADM;

c. Approve a Summary Notice of the proposed settlement for publication (the "Summary Notice") (substantially in the form of Exhibit B-2 hereto);

d. Direct the Company to mail or cause to be mailed by first class mail the Notice to those current shareholders who can be identified through reasonable effort, on or before the date specified in the Preliminary Approval Order;

e. Request that nominees who currently hold ADM common stock send the Notice to all beneficial owners of such ADM common stock within ten (10) days after receipt of the Notice;

f. Direct the Company to cause the Summary Notice to be published in the national edition of *The Wall Street Journal* on or before the date specified in the Preliminary Approval Order;

g. Find that the notice given pursuant to subparagraphs (b)-(f), above, constitutes the best notice practicable under the circumstances, including individual notice to all current shareholders of ADM who can be identified upon reasonable effort, and constitutes valid, due and sufficient notice to all current shareholders of ADM, complying fully with the requirements of Rule 23.1 of the Federal Rules of Civil Procedure, the Constitution of the United States, and any other applicable law;

h. Schedule the Settlement Hearing to be held by the District Court to consider and determine whether the proposed Settlement as contained in the Stipulation should be approved as fair, reasonable and adequate to ADM and its shareholders and whether the Judgment approving the Settlement should be entered;

i. Provide that any objections to: (i) the proposed Settlement contained in the Stipulation or (ii) entry of the Judgment approving the Settlement, shall be heard and any papers submitted in support of said objections shall be considered by the District Court at the Settlement Hearing only if, on or before the date specified in the Preliminary Approval Order and Notice, shareholders of ADM making such objections shall file and serve notilce of their intention to appear and copies of any papers in support of their position (which shall set forth each objection and the basis therefor) as set forth in the Preliminary Approval Order and Notice;

j. Provide that, upon the Effective Date, all shareholders of ADM and ADM shall be barred from asserting any Settled Claims and each and all shareholders of ADM and ADM shall conclusively be deemed to have released any and all such Settled Claims and that all claims which the Company has against the Excluded Persons, or may have against Andreas and Wilson, are not Settled Claims and shall be reserved to the Company in its sole discretion; and

k. Provide that the Settlement Hearing may, from time to time and without further notice to shareholders of ADM, be continued or adjourned by order of the District Court.

3. Upon approval of the Settlement by the District Court, Co-Lead Counsel for Plaintiffs in the Delaware Action will take all steps necessary in the Delaware Court to obtain Final Court Approval as promptly as may be done.

E. *Releases*

1. Upon the Effective Date, each shareholder of ADM shall be deemed to have, and by operation of the Judgment shall have, fully, finally and forever released, relinquished and discharged all Settled Claims.

2. Upon the Effective Date, each of the Director Defendants and ADM shall be deemed to have, and by operation of the Judgment shall have, fully, finally and forever released, relinquished and discharged each and all shareholders of ADM and counsel to the plaintiffs, each only in their capacity as such, from all claims, arising out of, relating to or in connection with the institution, prosecution, assertion or resolution of the Litigation or the Settled Claims.

3. Upon the Effective Date, ADM shall be deemed to have, and by operation of the Judgment shall have, fully, finally and forever discharged all Settled Claims, with ADM reserving to itself any claims which it has against the Excluded Persons, or which ADM may have against Andreas or Wilson.

F. *Conditions Of Settlement Effect Of Disapproval, Cancellation Or Termination*

1. The Stipulation is subject to the following conditions:

a. The District Court enters the Preliminary Approval Order;

b. The District Court approves the Stipulation and enters the Judgment.

c. The Effective Date occurs.

2. If any of the conditions in Section F, Paragraph 1 does not occur, the Stipulation shall be rendered null and void, unless the Parties mutually agree in writing to proceed with the Stipulation. In the event of such non-occurrence, the Parties shall be restored to their respective positions in the Actions prior to the execution of the Stipulation, and the terms and provisions of the Stipulation shall have no further force and effect with respect to the Parties and shall not be used in the Litigation or in any other proceeding, for any purpose, and any Judgment or Order entered by the District Court in accordance with the terms of the Stipulation shall be treated as vacated.

G. *Miscellaneous Provisions*

1. The Parties (a) acknowledge that it is their intent to consummate this agreement, and (b) agree to cooperate to the extent necessary to effectuate and implement all terms and conditions of the Stipulation and to exercise their best efforts to accomplish the terms and conditions of the Stipulation.

2. Neither the Stipulation nor the Settlement, nor any act performed or document executed pursuant to or in furtherance of the Stipulation or the Settlement: (i) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any Settled Claim or of any wrongdoing or liability of the Director Defendants or the Company; or (ii) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of any of the Director Defendants or the Company, in any civil, criminal or administrative proceeding

in any court, administrative agency or other tribunal, other than in such proceedings as may be necessary to consummate or enforce the Stipulation, the Settlement or the Judgment, and provided that the Director Defendants or the Company may file the Stipulation and/or the Judgment in any action that may be brought against any of them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment ban or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim. The Director Defendants and the Company have denied and continue to deny each and all of the claims alleged in the Litigation.

3. The Parties and their counsel, and each of them, agree, to the extent permitted by law, that all agreements made and orders entered during the course of the Litgation relating to the confidentiality of information shall survive this Stipulation.

4. All Exhibits to the Stipulation are material and integral parts hereof and are fully incorporated herein by this reference.

5. The Stipulation may be amended or modified only by a written instrument signed by or on behalf of all Parties or their respective sucessors-in-interest.

6. The Stipulation and the Exhibits attached hereto constitute the entire agreement among the Parties hereto and no representations, warranties or inducements have been made to any party concerning the Stipulation or its Exhibits other than the representations, warranties and covenants contained and memorialized in such documents.

7. Each counsel or other person executing the Stipulation or any of its Exhibits on behalf of any party hereto hereby warrants that such person has the full authority to do so.

8. No Party hereto shall make, or permit to be made, any public announcement or press release without the prior circulation to counsel for all of the parties to the MOU, and without the prior review and approval of the Company's legal counsel if by the Plaintiffs, or without the prior review and approval of Co-Lead Counsel for the Plaintiffs in the Actions if by the Company or by the Company or by the Director Defendants, which approval shall be communicated to the Company's legal counsel by Plaintiffs' Co-Lead Counsel in the Illinois Action.

9. The Stipulation may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. Counsel for the parties to the Stipulation shall exchange among themselves original signed counterparts and a complete set of original executed counterparts shall be filed with the District Court.

10. The Stipulation shall be binding upon, and inure to the benefit of, the successors and assigns of the parties hereto.

11. The District Court shall retain jurisdiction with respect to implementation and enforcement of the terms of the Stipulation, and all parties hereto submit to the jurisdiction of the District Court for purposes of implementing and enforcing the Settlement embodied in the Stipulation.

12. The Stipulation and the Exhibits hereto shall be considered to have been negotiated, executed and delivered, and to be wholly performed, in the State of Illinois and the rights and obligations of the parties to the Stipulation shall be construed and enforced in accordance with, and governed by, the internal, substantive laws of the State of Delaware without giving effect to that State's choice of law principles.

IN WITNESS WHEREOF, the parties hereto have caused the Stipulation to be executed by their duly authorized attorneys, as of May 29, 1997.

Co-Lead Counsel for Plaintiffs
In The Illinois Action

LAW OFFICES OF TERRY ROSE SAUNDERS

/s/ Terry Rose Saunders
TERRY ROSE SAUNDERS, ESQ.

[Counsel Listing Omitted]

EXHIBIT A

I. *Board Structures and Policies*

The Board of Directors shall have appropriate structures and policies to ensure that the Board acts at all times in the best interests of the Company and its shareholders. The Company looks to outside directors to provide an independent view of the performance of the Company and its management. Accordingly, to ensure the highest standards of independent judgment and accountability, a majority of the Board shall be comprised of outside directors.

Outside and Nonmanagement Directors Defined. An "outside director" means a director who

(a) is neither a current employee nor a former member of senior management of the Company or an affiliate;

(b) does not have any business or professional relationship with the Company, either personally or through a company of which the director is an officer or a controlling shareholder, that is material to the Company or to the director;

(c) does not have a close family relationship, by blood, marriage, or otherwise with any member of senior management of the Company or one of the Company's affiliates;

(d) is not an officer of a company of which the Company's chairman or chief executive officer is also a board member;

(e) is not personally receiving compensation from the Company in any capacity other than as a director; and

(f) does not personally receive or is not an employee of a foundation, university, or other institution that receives grants or endowments from the Company, that are

material to the Company or to either the recipient and/or the foundation, university, or institution.

A "*nonmanagement director*" means a director who is not a current employee of the Company.

Management and the Board. The Chief Executive Officer should be a member of the Board of Directors. In order to ensure the greatest number of outside directors on a board of manageable size, other direct management representation should be kept to a minimum and should in no event exceed two other management directors.

The Board of Directors shall make clear to senior management of the Company that board membership is neither necessary to their present positions nor a prerequisite to a higher management position in the Company. Attendance of management staff at Board Meetings should be at the discretion of the Chairman but should be encouraged by the Board. The Board should have full and direct access to members of senior management and should be encouraged to request reports directly to the Board by any member of senior management. Board members should use judgment in dealings with management so that they do not distract management from the business operations of the Company.

Conflicts of Interest. A director's personal financial or family relationships may occasionally give rise to that director's material personal interest in a particular issue. There will be times when a director's material personal interest in an issue will limit that director's ability to vote on that issue. The Board of Directors shall determine whether such a conflict of interest exists on a case-by-case basis. The Board shall take appropriate steps to identify such potential conflicts and to ensure that a majority of the directors voting on an issue are both disinterested and independent with respect to that issue.

"*Senior Management*" includes the chief executive, chief operating, chief financial, chief legal and chief account-

ing officers, president, vice president(s), treasurer, secretary and the controller of the Company.

"*Affiliate*" includes any person or entity which, alone or by contractual obligation, owns or has the power to vote more than twenty-five (25) percent of the equity interest in another, unless some other person or entity acting alone or with another by contractual obligation owns or has the power to vote a greater percentage of the equity interest. A subsidiary is considered an affiliate if it is at least eighty (80) percent owned by the Company and accounts for at least twenty-five (25) percent of the Company's consolidated sales or assets.

II. *Nominating Committee for 1997 Board Elections*

The Nominating Committee for selecting the directors to be proposed for election at the 1997 Annual Meeting shall be comprised of outside directors who were first elected to the Board of Directors after June 25, 1995.

III. *Amendment to By-Laws*

The provisions pertaining to the Board's structures and policies, set forth in Section I, will become part of ADM's By-Laws. Any changes to these provisions will be reported within thirty (30) days of their effective date on Form 8-K of the Securities and Exchange Commission attaching a copy of such amendments, and a copy of such amendments will be filed promptly with the New York Stock Exchange.

IV. *Leadership of the Board*

If the offices of the Chairman and Chief Executive Officer are combined in one person, or if the Chairman is not an outside director, then the outside directors shall annually elect one of their members to serve as Vice-Chairman. The Vice-Chairman shall preside over all meetings of nonmanagement directors and of the Governance

Committee. If the Chairman is an outside director, the Chairman will fulfill these functions.

V. *Independent Review Responsibilities of the Audit Committee*

The Board will charge the Audit Committee with the task of overseeing matters of legal compliance, including issues of potential discrimination, foreign corrupt practices act enforcement, environmental conduct, federal securities laws and disclosure requirements, and determining whether the company is engaged in any anticompetitive activities which would subject the Company to criminal and/or civil prosecution under state or federal antitrust laws.

The Board will charge the Audit Committee with the additional tasks of assuring that corporate information gathering and reporting systems exist which represent a good faith attempt to provide senior management and the Board with information respecting material acts, events or conditions within the Company. Such additional systems, if any, determined appropriate by the Audit Committee shall be implemented within nine (9) months of receiving the Board's Charge unless the Board extends the time in the exercise of its business judgment.

The Audit Committee shall consist solely of outside directors. For a period of three (3) years from the date of this Agreement, the Audit Committee shall consist of outside directors who were first elected to the Board of Directors after June 25, 1995.

The Audit Committee will promulgate, and have the authority to ensure adherence to, policies and procedures regarding compliance with the law, the Company's procedures for circulating these policies and for educating employees regarding compliance with these policies. Senior corporate officers shall report on a regular basis, not

less than three (3) times a year, to the Audit Committee regarding compliance with ADM's policies and procedures and all federal and state laws. The Audit Committee will report regularly, not less than three (3) times a year, to the Board of Directors regarding the effectiveness of the Company's policies and procedures. The Audit Committee will be assisted by outside independent counsel (who will be selected by the Audit Committee) who will be paid from the settlement proceeds fund created by this action for a period of at least three (3) years from the date of Final Court Approval of this Agreement.

The Company will not abolish the office of Corporate Compliance Officer unless the Audit Committee recommends its abolition and the Board approves its abolition.

VI. *Governance Committee*

The Board will create a permanent committee, consisting of the nonmanagement directors, to meet together at least annually to assess Board and Committee effectiveness and to report the results to the Board. The Governance Committee will establish and approve performance criteria for evaluation of the Chief Executive Officer, and all nonmanagement directors should participate in the actual evaluation of the Chief Executive Officer. The performance criteria and evaluation process shall be disclosed to shareholders in the Company's proxy statement for the annual shareholders' meeting.

VII. *Director Remuneration*

At least one-half of the Compensation for non-employee directors will be paid in ADM stock. For a period of three (3) years hereafter, total compensation for each director shall not exceed $100,000 per annum. The valuation of the stock will occur on the last day of the Company's fiscal year.

VIII. *Confidential Voting*

All proxies, ballot and voting tabulations that identify how shareholders voted are to be kept confidential, except: (i) to allow the independent election inspectors to certify the results of the vote; (ii) as necessary to meet applicable legal requirements, including the pursuit or defense of judicial actions; or (iii) in the event of any contested solicitation. The tabulators and the inspectors of election shall be independent and not the employees of ADM.

IX. *Audit, Compensation, Nominating and Succession Committees*

The Company will establish separate Audit, Compensation, Nominating and Succession Committees. The Audit, Compensation, and Nominating Committees shall be comprised exclusively of outside directors. The Succession Committee shall be comprised of a preponderance of outside directors.

X. *Public Policy Committee*

The Public Policy Committee shall be charged with the task of overseeing social responsibility of the Company and shall encourage the Company to communicate on such issues with institutional investors, analysts and other appropriate organizations.

EXHIBIT B-1

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

NOTICE OF HEARING ON PROPOSED SETTLEMENT OF DERIVATIVE ACTIONS

TO: ALL CURRENT HOLDERS OF ARCHER DANIELS MIDLAND COMPANY COMMON STOCK

PLEASE READ THIS NOTICE CAREFULLY; IT MAY AFFECT YOUR RIGHTS

THIS NOTICE RELATES TO A PROPOSED SETTLEMENT OF SHAREHOLDERS' DERIVATIVE ACTIONS AND CLAIMS ASSERTED THEREIN.

CURRENT HOLDERS OF ARCHER DANIELS MIDLAND COMPANY COMMON STOCK ARE ENTITLED TO OBJECT, IF THEY DESIRE, TO THE SETTLEMENT OF THE DERIVATIVE CLAIMS AS DESCRIBED HEREIN. IF THE COURT APPROVES THE DERIVATIVE SETTLEMENT, YOU WILL BE BARRED FROM CONTESTING THE FAIRNESS, REASONABLENESS OR ADEQUACY OF THE PROPOSED SETTLEMENT, AND FROM PURSUING THE SETTLED DERIVATIVE CLAIMS.

This Notice is given pursuant to Rule 23.1 of the Federal Rules of Civil Procedure and an Order of the United States District Court for the Central District of Illinois (the "Court"). The purpose of the Notice is to advise you that the above-entitled actions (the "Litigation") are now pending in the Court and the Delaware Chancery

Court (the "Delaware Court") and that all parties to the Litigation have reached a settlement (the "Settlement") which would fully, finally and forever resolve the Derivative Claims as between Plaintiffs and the Defendants, as defined herein, on the terms and conditions summarized in this Notice.

This Notice is not intended to be and should not be construed as an expression of any opinion by the Court with respect to the truth of the allegations of the Derivative Claims or the merits of the claims or defenses asserted. This Notice is merely to advise you of the pendency and proposed Settlement of the Derivative Claims and of your rights thereunder.

I. THE LITIGATION

This Litigation was commenced in July 1995, with the filing of purported derivative actions in the United States District Court for the Northern District of Illinois, the Circuit Court of Cook County, Illinois and the Delaware Court. The actions filed in Illinois were transferred to the Court, and plaintiffs filed a Consolidated and Amended Derivative Complaint, entitled *Paul Felzen, Trustee of Louise Laskin Trust—1991 and Sandra Esner, Plaintiffs, v. Dwayne O. Andreas, et al., Defendants, and Archer Daniels Midland Company, Nominal Defendant,* Case No. 2279 (the "Illinois Action"). The Plaintiffs in the Delaware Court filed an amended and consolidated complaint entitled *In: Re Archer Daniels Midland Company Derivative Litigation,* Consolidated No. 14403 (the "Delaware Action"). Both the Illinois Action and the Delaware Action (the "Actions" or the "Litigation") named as defendants Dwayne O. Andreas, Ralph Bruce, John H. Daniels, Howard G. Buffett, Lowell W. Andreas, James R. Randall, Michael D. Andreas, H.D. Hale, O. Glenn Webb, Martin Andreas, Margaretta Rockefeller, F. Ross Johnson, Ray A. Goldberg, John K. Vanier, Shreve M.

Archer, Jr., M. Brian Mulroney, and Robert S. Strauss, and the Delaware Action also named Gaylord O. Coan as a defendant (the "Director Defendants"). The Actions alleged, among other things, that the Director Defendants breached their fiduciary duties or obligations owed to the Company and the stockholders of the Company by participating in improper conduct or failing to properly supervise the activities of certain employees of the Company who had engaged in improper conduct, including violations of federal antitrust laws and federal securities laws.

II. PRETRIAL PROCEEDINGS AND DISCOVERY IN THE LITIGATION

A. *Defendants' Actions*

The Director Defendants and the Company have filed motions to dismiss the Actions. In their motions to dismiss, the Director Defendants and the Company argue that Plaintiffs, among other things, failed to make a demand upon the directors of ADM as required by Delaware law before bringing their action and failed to state a claim for relief against the Director Defendants. Plaintiffs opposed the motions. The motions to dismiss are being held in abeyance pending a hearing by the Court at which this Stipulation and the Settlement are to be presented.

After the announcement of the federal government's investigation into the charges that ADM had violated the antitrust laws and the filing of these Actions, the Company's Board of Directors appointed a Special Committee consisting of outside directors to investigate the charges made by the federal government and undertook certain actions in the areas of corporate governance, employee conduct, compliance, and succession.

ADM's Board of Directors also created the Corporate Governance Committee, consisting of outside directors to

examine, among other things, director qualifications and independence from management. In the Spring of 1996, the Company announced that certain of its directors, including Michael D. Andreas, would not stand for re-election. In April, 1997, the Company announced that Dwayne Andreas had retired from his position as CEO of the Company and that G. Allen Andreas, Jr. would become the CEO and a member of the Board. In addition, the Company announced the election of Ambassador Andrew Young to the Board and the retirement of Lowell Andreas from the Board.

B. *Discovery, Investigation And Research Conducted By Plaintiffs*

Counsel for Plaintiffs have conducted certain discovery and conducted an extensive investigation during the prosecution of the Litigation. Co-Lead Counsel for Plaintiffs in the Illinois Action consulted extensively with experts in the areas of corporate governance and economics and with the Company's largest institutional investors and reviewed and analyzed treatises, articles and authoritative reports on corporate governance issues. In addition, all Plaintiffs' Counsel reviewed and analyzed thousands of pages of documents produced by Defendants, reviewed and analyzed the Company's public filings and press releases, and thoroughly analyzed and evaluated the facts supporting Plaintiffs' claims.

III. THE PROPOSED SETTLEMENT

Based on Plaintiffs' investigation, Plaintiffs have agreed with ADM that it is in the best interests of ADM and its shareholders to settle the derivative claims on the terms of the Stipulation of Settlement. The following description of the proposed Settlement is only a summary, and reference is made to the text of the Stipulation of Settlement, on file with the Court, for a full statement of its provisions:

(i) In Settlement of the derivative claims, the Director Defendants will pay or cause to be paid the total sum of $8 Million to ADM.

(ii) As additional consideration for Settlement of the Litigation, the Board of Directors has also agreed to adopt, upon approval by the Court of the Settlement the corporate governance measures and procedures which are set forth in Exhibit A which is attached to this Notice.

(iii) If the proposed Settlement is approved by the Court, the Court will enter a judgment which will dismiss the derivative claims as against the Director Defendants with prejudice, and all shareholders of ADM shall be barred and enjoined from asserting any Settled Claims, as this term is defined in the Stipulation of Settlement (*i.e.*, causes of action involving breaches of fiduciary duties relating to the allegations in this Litigation) against the Director Defendants or ADM and each and all shareholders shall conclusively be deemed to have released any and all such Settled Claims as against the Director Defendants and ADM.

(iv) All the claims that the Company may have against Michael Andreas, Terrance Wilson, Mark Whitacre, Reinhard Richter, Sidney Hulse and Marty Allison, are reserved to the Company and are not released by the Stipulation of Settlement, nor are they Settled Claims.

(v) Legal counsel for the Plaintiffs in the Actions may make application to the Court for an award of attorney fees, expenses and costs. The Company and the Director Defendants agree not to oppose an application(s) for an award of attorney fees, costs and expenses which does not exceed 49% of the Settlement Proceeds deposited in the Escrow Account, plus interest.

IV. NOTICE TO BANKS, BROKERS, AND OTHER NOMINEES

(a) Banks, brokerage firms, institutions, and other persons who are nominees who currently hold the common stock of ADM for the beneficial interest of other persons are requested within ten (10) days of receipt of the Notice, to forward a copy of the Notice to each such beneficial purchaser and provide the Company with written confirmation that the notice has been so forwarded. Your reasonable costs and expenses of complying with this provision will be paid upon submission of appropriate documentation to the Company. Additional postage prepaid copies of the Notice may be obtained from the Company for forwarding to such beneficial owners. All such correspondence to the Company should be addressed as follows:

Christine Ferguson
ADM
P.O. Box 1470
Decatur, IL 62525
217-424-5656

V. THE HEARING

(b) A hearing (the "Settlement Hearing") will be held before the Honorable Harold A. Baker, United States District Judge, United States District Court, Central District of Illinois, on July 7, 1997, at 9:30 a.m. at the United States Courthouse, 201 South Vine Street, Urbana, Illinois for the purpose of determining (1) whether the proposed Settlement is fair, reasonable and adequate and whether it should be approved by the Court; (2) whether, thereafter, this Litigation should be dismissed with prejudice as set forth in the Stipulation of Settlement dated as of May 29, 1997, on file with the Court; and (3) the reasonableness of the application of plaintiffs' counsel for the payment of attorneys' fees and reimbursement of costs and expenses incurred in connection with this Litigation.

The Settlement Hearing may be continued or adjourned from time to time by the Court at the Settlement Hearing or any continued or adjourned session thereof without further notice.

(c) Any current shareholder of ADM may appear at the Settlement Hearing to show cause why the proposed Settlement should not be approved or why a judgment should or should not be entered thereon; provided, however, that no such person shall be heard, unless his or her objection or opposition including the basis therefor is made in writing and is filed, together with copies of all other papers and briefs to be submitted by him or her to the Court at the Settlement Hearing, with the Court no later than July 3, 1997, and showing due proof of service on Plaintiffs' Co-Lead Counsel:

SPECTOR & ROSEMAN, P.C.
ROBERT M. ROSEMAN, ESQ.
2000 Market Street, 12th Floor
Philadelphia, PA 19103
215-864-2400

LAW OFFICES OF TERRY ROSE SAUNDERS
TERRY ROSE SAUNDERS, ESQ.
30 North LaSalle Street
Suite 3200
Chicago, IL
312-346-4456

and Counsel for ADM:

A. JAMES SHAFTER, Esq.
KEHART, SHAFTER & HUGHES
500 First of America Center
Decatur, IL 62525
217-428-7950

Unless otherwise ordered by the Court, any shareholder of ADM who does not make his or her objection or opposition in the manner provided shall be deemed to have waived all objections and opposition to the fairness, reasonableness and adequacy of the proposed Settlement.

VI. EXAMINATION OF PAPERS AND INQUIRIES

This notice contains only a summary of the terms of the proposed Settlement. For a more detailed statement of the matters involved in this action, reference is made to the pleadings, to the Stipulation of Settlement and to other papers filed in this action which may be inspected at the Office of the Clerk of the United States District Court, United States Courthouse, 201 South Vine Street, Urbana, IL, during business hours of each business day.

Inquiries regarding this action should be addressed as follows:

SPECTOR & ROSEMAN, P.C.
ROBERT M. ROSEMAN, ESQ.
2000 Market Street, 12th Floor
Philadelphia, PA 19103
215-864-2400

DO NOT CONTACT THE COURT REGARDING THIS NOTICE

DATED: May 30, 1997

BY ORDER OF THE COURT
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ERRATA SHEET

The Notice unintentionally omits the following information: The only claims which are being settled in the District Court are those which have been made in the Illinois Action. Upon approval of the Settlement by the District Court, Co-Lead Counsel in the Delaware Action will apply to dismiss that Action based on the Settlement and will not apply to the Delaware Court for fees and expenses. The inclusion of the Delaware caption in the Notice is not intended to imply to the contrary.

Inquiries regarding this action should be addressed as follows:

SPECTOR & ROSEMAN, P.C.
ROBERT M. ROSEMAN, ESQ.
2000 Market Street, 12th Floor
Philadelphia, PA 19103
215-864-2400

ZWERLING, SCHACHTER & ZWERLING, LLC
SUSAN SALVETTI, ESQ.
767 Third Avenue, 22nd Floor
New York, New York 10017
212-223-3900

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

Case No. 95-2279
Honorable Harold A. Baker
Judge Presiding

PAUL FELZEN, TRUSTEE OF LOUISE LASKIN TRUST—1991 and SANDRA ESNER,
Plaintiffs,
v.
DWAYNE O. ANDREAS, *et al.*,
Defendants,
and
ARCHER DANIELS MIDLAND COMPANY,
a Delaware Corporation,
Nominal Defendant.

SUMMARY NOTICE OF DERIVATIVE LITIGATION SETTLEMENT

TO: ALL CURRENT HOLDERS OF ARCHER DANIELS MIDLAND COMPANY COMMON STOCK:

YOU ARE HEREBY NOTIFIED that the parties to the above litigation have entered into a Stipulation of Settlement (the "Stipulation") with Defendants to resolve the issues raised in the Derivative Claims against the Defendants.

PLEASE BE FURTHER ADVISED that pursuant to an Order of the United States District Court for the

Central District of Illinois, dated May 30, 1997, that a Hearing will be held on July 7, 1997 at 9:30 a.m. before the Honorable Harold A. Baker at the United States Courthouse located at 210 South Vine Street, Urbana, Illinois for the purpose of determining (1) whether the proposed settlement of the Derivative Claims against Defendants as set forth in the Stipulation of Settlement dated as of May 29, 1997, on file with the Court, should be approved by the Court as fair, reasonable and adequate to ADM and its common stockholders; (2) whether, thereafter, the Derivative Claims should be dismissed with prejudice pursuant to the terms of the Stipulation of Settlement; and (3) the reasonableness of the application of plaintiffs' counsel for the payment of attorneys' fees and reimbursemet of costs and expenses incurred in connection with this Litigation, together with interest thereon. If you are a shareholder of ADM, your rights may be affected by the settlement of this action.

If you currently own ADM common stock and have not received a Notice of Hearing on Proposed Settlement of Derivative Action, you may obtain copies by contacting:

ROBERT M. ROSEMAN, ESQ.
SPECTOR & ROSEMAN, P.C.
2000 Market Street, 12th Floor
Philadelphia, PA 19103
215-364-2400

TERRY-ROSE SAUNDERS, ESQ.
LAW OFFICES OF TERRY ROSE SAUNDERS
30 North LaSalle Street, Suite 3200
Chicago, IL 60602
312-346-4456

Co-Lead Counsel for Plaintiffs

or

A. James Shafter, Esq.
KEHART, SHAFTER & WEBBER, P.C.
500 First of America Center
P.O. Box 871
Decatur, IL 62525
Cousel for ADM

PLEASE DO NOT CONTACT THE COURT OR THE CLERK'S OFFICE.

Dated: May 30, 1997

BY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS

[Filed May 30, 1997]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

[Caption Omitted in Printing]

ORDER PRELIMINARILY APPROVING SETTLEMENT AND PROVIDING FOR NOTICE

Whereas, derivative claims are pending before the court in the case entitled *Paul Felzen, Trustee of Louise Laskin Trust—1991 and Sandra Esner vs. Dwayne O. Andreas, et al., and Archer Daniels Midland Company,* Case No. 95-cv-2279 (the "Illinois Action") and similar derivative claims are pending before the Delaware Court of Chancery in *In re Archer Daniels Midland Company,* Consolidated C.A. No. 14403 (the shareholders' derivative claims are collectively referred to as the "derivative claims"), and

Whereas, the parties to the Illinois Action have applied to the court, pursuant to Rule 23.1 of the Federal Rules of Civil Procedure for an order approving the settlement of the Illinois Action and resolution of the Delaware claims in accordance with the Stipulation of Settlement, dated May 29, 1997 (the "Stipulation"), which, together with the exhibits annexed thereto, sets forth the terms and conditions for a proposed settlement of the derivative claims and for dismissal of the Illinois Action as against the defendants upon the terms and conditions set forth therein; and the court having read and considered the Stipulation and the exhibits annexed thereto;

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. This order (the "Preliminary Approval Order") hereby incorporate by reference the definitions in the Stipulation, and all terms used herein shall have the same meanings as set forth in the Stipulation;

2. The court hereby preliminarily approves the Stipulation and the settlement described therein as being fair, reasonable and adequate to ADM and its shareholders;

3. A hearing (the "Settlement Hearing") shall be held before the undersigned United States District Judge on July 7, 1997 at 9:30 a.m., at the United States Courthouse, Central District of Illinois, 201 South Vine Street, Urbana, Illinois to determine whether the proposed settlement of the derivative claims on the terms and conditions provided in the Stipulation is fair, reasonable and adequate and should be approved by the court; whether a judgment, as provided in ¶ F.1.b. of the Stipulation should be entered herein; and to determine whether plaintiffs' counsels' fees and expenses should be approved;

4. The court hereby approves, as to form and content, the Notice of Hearing on Proposed Settlement of Derivative Action (the "Notice"), and the Summary Notice for Publication (the "Summary Notice") annexed as exhibits B-1 and B-2 attached to the Stipulation. The court finds that the publication, mailing and distribution of the Notice and the Summary Notice substantially in the manner and form set forth in ¶ 5 of this order meets the requirements of Fed.R.Civ.P. 23.1 and due process, and is the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons who are entitled thereto.

5. The cost of notice to shareholders will be paid in accordance with ¶ B.2. of the Stipulation. The Company is hereby authorized to supervise and administer the giving of notice as set forth below;

(a) On or before May 30, 1997, the Company shall mail or cause to be mailed copies of the notice substantially in the form annexed to the Stipulation as exhibit B-1 to all current shareholders of record of ADM as of May 29, 1997, who can be identified with reasonable effort;

(b) On or before June 13, 1997, the Company shall cause a Summary Notice, substantially in the form an-

nexed to the Stipulation as exhibit A-2, to be published once in the national edition of *The Wall Street Journal*;

(c) At or prior to the Settlement Hearing provided for in ¶ 3 of this order, a representative on behalf of the Company shall serve and file with the court proof by affidavit of such publication and mailing.

6. Nominees who currently hold ADM stock as of May 29, 1997, shall send the Notice to all beneficial owners of such ADM common stock within 10 days after receipt of the Notice.

7. Any shareholder of record of ADM as of May 29, 1997, may appear and show cause, if he, she or it has any, why the proposed settlement of the derivative claims embodied in the Stipulation should or should not be approved as fair, reasonable and adequate, or why a judgment should or should not be entered thereon; provided, however, that no shareholder of ADM or any other person shall be heard or entitled to contest the approval of the terms and conditions of the proposed settlement, or, if approved, the judgment to be entered thereon approving the same, unless on or before July 3, 1997, that person has served by hand, or by first class mail delivered on said date, written objections, including the basis therefor, and copies of any papers and briefs in support of their position upon Robert M. Roseman, Esq. Spector & Roseman, P.C., 2000 Market Street, 12th Floor, Philadelphia, PA 19103 and Terry Rose Saunders, Law Offices of Terry Rose Saunders, Esq., 30 North LaSalle Street, Suite 3200, Chicago IL 60602, Co-Lead Counsel for Plaintiffs; and A. James Shafter, Esq., Kehart, Shafter & Hughes, 500 First Amer ca Center, Decatur, Illinois, 62525, counsel for ADM, and said objections, papers and briefs have been received by the Clerk of the court. Co-lead Counsel for plaintiffs shall immediately serve by facsimile and overnight mail copies of any written objections and any papers and briefs served upon them to Susan Salvetti, Esq., Zwerling, Schachter & Zwerling, LLP, 767

Third Avenue, New York, NY 10022. The above listed counsel will give prompt notice of any such objections received to other counsel on their respective side of the case. Any shareholder of ADM who does not make his, her or its objection in the manner provided for herein, shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness or adequacy of the proposed settlement as incorporated in the Stipulation, unless otherwise ordered by the court.

8. Upon the effective date, all shareholders of ADM and ADM shall be barred from asserting any settled claims, as defined in the Stipulation, and each and all shareholders of ADM and ADM shall conclusively be deemed to have released any and all such settled claims, and all claims which the Company has against the Excluded persons, as defined in the Stipulation, or may have against Andreas and Wilson, as defined in the Stipulation, are not settled claims and shall be reserved to the Company in its sole discretion.

9. All papers in support of the settlement and for reimbursement of attorneys' fees and expenses shall be filed at least 7 days prior to the settlement hearing.

10. The court reserves the right to continue or adjourn the date of the settlement hearing and any continuance or adjournment thereof without further notice to the shareholders of ADM and retains jurisdiction to consider all further applications arising out of or connected with the proposed settlement.

Enter this 30th day of May 1997.

/s/ Harold A. Baker
HAROLD A. BAKER
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

OBJECTION TO PROPOSED SETTLEMENT OF DERIVATIVE ACTIONS

COME NOW, Charles W. Pauly, Jr. and Elizabeth D. Pauly, joint tenants and file this Objection to Proposed Settlement of Derivative Actions and would show to the Court as follows:

1. If the Plaintiffs' case *has merit*, then the financial settlement is grossly inadequate to compensate the Plaintiffs for the injuries suffered as a result of the actions by the Defendants.

2. If the Plaintiffs' case *is without merit*, then the case is being settled for nuisance value which compensates Plaintiffs' attorneys, but does nothing to enhance shareholder value. In fact, it only demonstrates the company is a "soft" target for future frivolous litigation.

3. Plaintiffs should be put to trial and demonstrate the merits of their claim. If Plaintiffs are successful, then damages will be substantially higher than the nominal consideration being received in the settlement. If Plaintiffs are unsuccessful, the suit was without merit and the Plaintiffs and their counsel should receive nothing.

WHEREFORE, premises considered, movant requests the Court deny the proposed settlement as being unfair and inadequate to the shareholders of Archer Daniels Midland Company.

/s/ Charles W. Pauly
CHARLES W. PAULY
517 South Main Street
P.O. Box 409
Carthage, Missouri 64836
(417)358-4049 Telephone

[Certificate of Service Omitted in Printing]

[Filed Jun 26, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

OBJECTION OF MITCHELL BERNS TO AWARD OF EXCESSIVE ATTORNEYS' FEES

MITCHELL BERNS states for his objection to an award of excessive attorneys' fees:

1. I own 600 shares of ADM common stock through a profit sharing account at PaineWebber. My residence is 201 N Street, N.W., Apt. 702, Washington, D.C. 20037. I am employed as the Director of the Office of Supervision at the Federal Housing Finance Board, a federal regulatory agency in Washington. Previous to my government employment, I practiced law in New York City, including the representation of plaintiffs and defendants in securities class actions.

2. I have no specific knowledge regarding the facts or the court file, and take no position on the merits of the proposed settlement. It appears from the Notice of Settlement Hearing ("Notice") I received in the mail that the settlement comprises an $8 million payment by defendant directors to the company and the adoption of certain common sense corporate governance controls and procedures, of the sort that a public corporation might well be inclined to adopt irrespective of allegations of wrongdoing.

3. The Notice indicates that the defendants have agreed not to oppose a fee award of up to 49% of the

setttlement fund. This action is two years old. It appears that little formal discovery was taken, and that the settlement comes at an early stage in the proceedings. Although plaintiffs' counsel are to be commended for pursuing the matter, it would appear difficult to justify a fee award of more than 15-20% of the settlement proceeds under the circumstances. A proposed settlement including a 49% no-objection clause raises concerns about potential over-reaching on its face.

4. Securties class actions, diligently pursued, can be an effective mechanism for the enforcement of shareholder rights. However, fee awards that appear excessive in light of the benefit achieved undermine public confidence in the courts and in the efficacy of the derivative and class action mechanism.

5. I therefore respectfully request that the Court make a fee award that fairly compensates plaintiffs' counsel, yet takes due account of the results achieved by the settlement.

[Proof of Service Omitted in Printing]

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Mitchell Berns
MITCHELL BERNS

Dated: June 23, 1997

110 Daryl Ave.
Novato, CA 94947

June 23, 1997

Honorable Harold A. Baker
Judge Presiding
In the United States District Court
For the Central District of Illinois
Urbana, Illinois

Dear Judge Baker:

I am writing about Case No. 95-2279, Paul Felzen, Trustee of Louise Laskin Trust—1991 and Sandra Esner V. Dwayne O. Anderas [*sic*], Et. Al., and Archer Daniels Midland Company.

I am a shareholder of Archer Daniels Midland Company. I have received an eight page package from the attorneys and have responded to them.

My concern is that the legal counsel for the Plaintiffs may request up to 49% of the Settlement Proceeds. Additionally the agreement states the Defendants agree not to oppose an application(s) for an award of such amount. The legal counsel for Plaintiffs now has a conflict of interest with the Plaintiffs. Please exercise your judicial powers and only award to counsel a fair amount. To me, 49% seems excessive and should not be allowed.

Sincerely,

/s/ John P.Chiara
JOHN P. CHIARA

TWO MONTAGUE TERRACE
BROOKLYN, NEW YORK 11201-4105

June 19, 1997

Hon. Harold A. Baker
United States District Court Judge
U.S. District Court House
201 South Vine Street
Urbana, Il 61801

Ref Paul Felzen, Trustee v. A.D.M.
Case no. 95-2279

Dear Judge Baker,

As an A.D.M. shareholder of record (1042 shares, which are in my account with Dean Witter), I received notice of a proposed settlement of the above case.

At least one aspect of the proposed settlement deserves your close scrutiny: attorney fees, costs and expenses not to exceed 49 pct. of the settlement proceeds.

I have to say that I am in the shipping business, as a chartering broker, where my firm works, sometimes for weeks, setting up charters, for 1.25 pct. of the freight charges on an ocean shipment. Usually the freights are $300,000 or $400,000, yielding us say $3000 to $5000 per charter. Real estate brokers get 10 or maybe 15 pct. commissions, and that is, I believe often split between brokers. 49 pct is beyond any normal conception, and I urge you to substantially reduce the percentage of the settlement fees to the attorneys.

It crosses my mind that there are law firms in both Philadelphia and Chicago, and maybe in Delaware, involved in this case. When I am trying to arrange a charter, the market dictates that I involve as few brokers and thus as few commissions payable as possible, and

I think that law firms should be encouraged to act similarly whenever possible. You hold the possibility of such encouragement in your hands.

The irony of a suit brought on behalf of shareholders, the results of which are eaten away at 49% for attorneys fees will, I am sure, not have escaped you.

Very truly yours,

/s/ Peter D. Scott
PETER D. SCOTT

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

AFFIDAVIT OF SUSAN SALVETTI IN SUPPORT OF THE PROPOSED SETTLEMENT AND THE PETITION OF DELAWARE PLAINTIFFS' COUNSEL FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

STATE OF NEW YORK)
) ss. :
COUNTY OF NEW YORK)

Susan Salvetti, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice law before the courts of the State of New York, as well as the United States District Courts for the Southern and Eastern Districts of New York, and for the Central District of Illinois. I am a member of the law firm of Zwerling, Schachter & Zwerling, LLP, which, together with Wechsler Harwood Halebian & Feffer LLP and Bernstein Liebhard & Lifshitz, constitute co-lead counsel for plaintiffs in the matter: *In Re: Archer Daniels Midland Company* (Consolidated C.A. No. 14403) pending in the Court of Chancery of the State of Delaware (the "Delaware Action"). As such, I have personal knowledge of the matters set forth herein based upon my supervision and participation in this litigation as a co-lead counsel.

2. This affidavit is submitted in support of the proposed settlement reached and encompassed by a Stipulation of Settlement, dated May 29, 1997, entered by and

among: (i) the plaintiffs in the above-encaptioned matter, *Paul Felzen, Trustee of Louis Laskin Trust—1991, et ano v. Dwayne O. Andreas, et al., Defendants, and Archer Daniels Midland Company, Nominal Defendant,* pending in this Court (the "Illinois Action"), and the plaintiffs in the Delaware Action, on behalf of themselves, as shareholders of nominal defendant Archer Daniels Midland Company ("ADM" or the "Company") and derivatively on behalf of ADM, (ii) the Director Defendants, defined in paragraph 5 below, and (iii) Nominal Defendant, ADM ("Stipulation of Settlement"). This affidavit is also submitted in support of the application by plaintiffs' counsel in the Delaware Action ("Delaware Counsel") for an award of attorneys' fees and expenses in the amount of $2,664,000 (representing 33⅓% of the $8 million Settlement Fund), to be apportioned equally between plaintiffs' counsel in the Delaware and Illinois Actions, rather than the application by Illinois plaintiffs' counsel for an award of attorneys' fees, costs and expenses in the amount of up to 49% of the $8 million Settlement Fund, or $3,920,000.

3. The Stipulation of Settlement, together with the exhibits annexed thereto, represents the terms and conditions of the proposed settlement, which was preliminarily approved by this Court after a hearing on May 30, 1997. At that time, the Order Preliminarily Approving Settlement and Providing for Notice was entered (the "Order"). On June 13, 1997, a Summary Notice of Settlement appeared in the national edition of *The Wall Street Journal.* In addition, pursuant to the Order, notices have been sent to all current shareholders of record of ADM as of May 29, 1997 ("Record Shareholders"). To date, over 243,000 notices have been sent, yet only five objections have been received, discussed *infra.*

4. This affidavit sets forth the facts that demonstrate that the proposed settlement is fair, reasonable and adequate to ADM and its shareholders and should be approved. When viewed against the risk of establishing demand futility pursuant to Delaware Chancery Rule 23.1, and overcoming the 8 Del. Ch. § 102(b)(7) exculpatory provision in ADM's Certificate of Incorporation, the proposed settlement is outstanding in the context of both the value of its therapeutic benefits, particularly those pertaining to corporate compliance issues, as well as its monetary benefits.

I.

Events Leading to the Proposed Settlement

5. The Delaware Action was commenced in July 1995 with the filing of numerous individual shareholder derivative suits, against Dwayne O. Andreas, Michael D. Andreas, Lowell W. Andreas, Martin L. Andreas, H. D. Hale, James R. Randall, Ralph Bruce, John H. Daniels, Shreve M. Archer, Jr., Ray A. Goldberg, John K. Vanier, Gaylord O. Coan, M. Brian Mulroney, Margaretta Rockefeller, O. Glenn Webb, F. Ross Johnson, Howard G. Buffett and Rober S. Strauss (the "Director Defendants"), all current or former directors of ADM. At the same time, ADM shareholders filed the Illinois Action. By mid-September 1995, there were thirteen derivative suits filed in Delaware.

6. On September 21, 1995, an organizational meeting of all Delaware Counsel was held wherein my firm, together with the firms of Wechsler, Harwood, Halebian & Feffer, LLP and Bernstein, Liebhard & Lishitz were elected plaintiffs' co-lead counsel ("Delaware co-lead counsel") with the authority, *inter alia,* to monitor, supervise and coordinate all aspects of the litigation.

7. On October 10, 1995, Delaware co-lead counsel traveled to Washington, D.C. at the request of Williams & Connolly, counsel for ADM in the Delaware Action. At the meeting, it was agreed that to avoid unnecessary duplication of discovery, Delaware Counsel, to the extent practicable, would coordinate and participate in the dis-

covery then being organized in connection with various antitrust and securities class action cases brought against ADM; however, such participation would not preclude Delaware Counsel from seeking additional discovery regarding the pending derivative issues.

8. By Order of Consolidation dated March 3, 1996, all of the Delaware derivative actions were consolidated for all purposes, and the Court approved the appointment of Delaware co-lead counsel. It was further ordered that as soon as practicable, a consolidated amended complaint would be filed and that Plaintiffs' First Request for Production of Documents filed in one of the individual Delaware actions would be designated as plaintiffs' First Document Request.

9. At all times following the Court of Chancery's March 3, 1996 Order, Delaware Counsel conducted informal discovery of the facts involved in the Delaware Action. As relevant news about ADM appeared almost daily, Delaware Counsel began drafting a consolidated amended derivative complaint, while also preparing third-party discovery requests directed to the Department of Justice. Subpoenae were also prepared and served upon certain foreign competitors alleged to have been involved in price fixing activities with ADM. Delaware Counsel also further investigated and drafted memoranda analyzing and summarizing the inter-relationships (personal and business) between and among the Director Defendants which we believed were instrumental in developing evidence supporting the allegations that the Director Defendants breached their duty of loyalty, and lacked independence such that pre-suit demand was futile.

10. In May 1996, I was advised by Williams & Connolly, that the first wave of document production by ADM was being organized in Chicago and that, subject to counsels' execution of a confidentiality stipulation, document review would begin in or about June or July.

11. Document review began the week of July 8, 1996, with a team of fourteen lawyers on behalf of the Delaware Action reviewing over one hundred boxes of documents produced by ADM in Chicago. A second session was held in September 1996, which included the review of an additional seventy boxes of documents.

12. At the end of September 1996, Delaware co-lead counsel learned that a settlement had been reached in the ADM securities class action. To ensure that the terms of that settlement could not be construed to release any pending derivative claims, Delaware co-lead counsel prepared and forwarded to securities class counsel specific language preserving the derivative claims for inclusion in that settlement.

13. Following the news in mid-October 1996 that ADM had pled guilty to criminal price-fixing charges, Delaware co-lead counsel filed its Amended and Consolidated Derivative Complaint on November 19, 1996, which included all events that had occurred in 1996.

14. The Amended and Consolidated Derivative Complaint alleged, among other things, that the Director Defendants had breached their fiduciary duties of good faith, loyalty, and care owed to ADM and its stockholders by, among other things, failing to supervise the activities of ADM officers, and by failing to implement and maintain internal systems of control and compliance to detect violations of the law.

15. On December 12, 1996, ADM served its notice of motion to dismiss the Amended and Consolidated Derivative Complaint. Thereafter, through January and the beginning of February 1997, five separate motions to dismiss with supporting memoranda of law were filed by the following defendant groups: (1) defendants Archer, Bruce, Coan, Daniels, Goldberg, Hale, Johnson, Mulroney, Rockefeller, Strauss, Vanier and Webb; (2) nominal defendant ADM; (3) defendant Randall; (4) the Andreas defendants; and (5) defendant Buffett.

16. The focus of the motions to dismiss in the Delaware Action was directed to three primary issues: pre-suit demand pursuant to Delaware Chancery Rule 23.1, whether plaintiffs stated a claim for breach of fiduciary duty pursuant to Chancery Rule 12(b)(6), and whether ADM's adoption of exculpatory provisions in its Certificate of Incorporation required dismissal of the complaint pursuant to 8 Del. Ch. § 102(b)(7). Thus, the Director Defendants and the Company argued that: the Delaware plaintiffs had not met their burden of establishing demand futility; the Delaware plaintiffs had not stated a claim for relief; and pursuant to Delaware law, 8 Del. Ch. § 102 (b)(7), the defendants could not be held liable, as a matter of law, for any of the breaches of duty alleged in the Amended and Consolidated Derivative Complaint.

17. While opposition to the motions to dismiss was being finalized, Delaware co-lead counsel were asked to attend a meeting with Robert Roseman, Esq. and Terry Rose Saunders, Esq., co-lead counsel in the Illinois Action (collectively "Illinois co-lead counsel"). For the first time, Delaware co-lead counsel learned that settlement negotiations had been held between the parties in the Illinois Action, to the exclusion of the Delaware plaintiffs.

18. On April 30, 1997, Delaware co-lead counsel met with Illinois co-lead counsel in New York. At that meeting, Mr. Roseman advised us that settlement negotiations in the Illinois Action had been ongoing since December 1996. and that the parties had reached an agreement in principle. Mr. Roseman summarized the terms of the agreement and requested that Delaware co-lead counsel seriously consider joining in the agreement since, in his opinion, negotiations were near completion. At the conclusion of the meeting, Delaware co-lead counsel requested that a copy of the term sheet, described by Mr. Roseman as Exhibit "A" to the Memorandum of Understanding (then being drafted), be produced for our review and analysis.

II.

Enhancements to the Proposed Settlement Procured by Delaware Counsel

19. Following a series of daily conversations with counsel for ADM regarding production of the term sheet, it was produced to Delaware co-lead counsel pursuant to a letter agreement of confidentiality on May 5, 1997. Upon review of the term sheet, one of the Delaware co-lead counsel, Stanley Bernstein, Esq., recognized that it was patterned after the settlement in *In re Sears Shareholder Litigation*, No. 88CH/0009 (Cir. Ct. Cook Cty., Ch. Div. 1988), which he personally had developed.

20. As presented, the provisions of the term sheet provided a framework for settlement; however, Delaware co-lead counsel remained concerned that, among other things, important issues of corporate compliance—going to the very heart of the Delaware Action—remained unaddressed and unresolved. Accordingly, following review of various treatises and articles regarding corporate governance and compliance, consultation with an expert, as well as communications with a large institutional investor of ADM, negotiations began between Delaware co-lead counsel and counsel for ADM, as well as the Director Defendants, to address and incorporate clarifications, changes and additional protections into the settlement to enhance its benefits and satisfy Delaware co-lead counsels' concerns.

21. Notwithstanding the position of some ADM counsel that negotiations as to the provisions of the term sheet were "closed", Delaware co-lead counsel refused to agree to the term sheet, despite the risk that a settlement might be approved without regard to the concerns or claims of the Delaware plaintiffs.

22. During the next twenty-four days, Delaware co-lead counsel were involved in daily, intensive negotiations with counsel for ADM and the Director Defendants, in-

cluding two face-to-face meetings in Delaware and Chicago. Illinois co-lead counsel played no active role in these meetings.

23. Three primary issues provided the focal point of these arm's-length negotiations: first, as to corporate compliance, Delaware co-lead counsel sought agreement by the Director Defendants and ADM to implement an information gathering and reporting system which would provide senior management and ADM's Board of Directors (the "Board") with knowledge of material acts, events or conditions within the Company; a reporting system between senior corporate officers and a Committee of the Board regarding compliance with ADM's policies and procedures and all federal and state laws; and, in turn, a reporting system between that Committee and the entire Board as to the effectiveness of the Company's policies and procedures. As to these points, counsel for ADM acknowledged our concerns, and were amenable to making meaningful enhancements to the agreement to allay those concerns. Thus, language was incorporated into the term sheet to require that such systems would exist within the Company. As a result, Section V of the term sheet requires that a reporting system must be established to provide direct communication between senior management and the Audit Committee, as well as between the Audit Committee and the Board. Senior management must report on a "regular basis" of "not less than three (3) times a year" regarding "compliance with ADM's policies and procedures and all federal and state laws," and the Audit Committee must report to the Board, on the same regular basis, regarding "the effectiveness of the Company's policies and procedures." Thus, as a result of Delaware counsels' efforts, the Audit Committee's compliance duties are proactive rather than reactive.

24. As detailed in the accompanying affidavit of Professor James L. Bicksler, an expert in the areas of financial economics and corporate governance, active corporate compliance in the form of monitoring and reporting between the board of directors and senior management is a most basic responsibility of an effective board. Such complicance systems are thus crucial to establish a strong corporate structure as well as to foster shareholder prosperity. That is exactly what, among other things, the proposed settlement now accomplishes. (The affidavit of Professor Bicksler is annexed hereto as Exhibit "A").

25. Second, Delaware co-lead counsel required, and it was agreed, that various provisions regarding corporate governance procedures be compulsory in nature, rather than permissive. In the opinion of Delaware co-lead counsel, defendants' agreement was particularly significant, because for example, a majority of the Board "shall" be comprised of outside directors; the Board "shall" have appropriate structures and policies to ensure that it acts in the best interest of the Company and its shareholders; the Board "shall" determine whether any conflict of interest exists between a director's personal interest in an issue and his ability to vote, the Board "shall" take appropriate steps to identify such potential conflicts, and ensure that a majority of the directors voting on an issue are both distinterested and independent with respect to that issue. (*See also* Bicksler affidavit ¶¶ 37, 38 and 41). Third, as to the definition of "outside" director, Delaware co-lead counsel sought, and it was agreed, that any relationship between a director "by blood or marriage" with a member of senior management would be deemed a "close family relationship" for purposes of exclusion of that person on the board as an outside director.

26. Agreement regarding all of the foregoing terms was finally reached on May 28, 1997, at which time Delaware co-lead counsel signed the Memorandum of Understanding ("MOU"). The Stipulation of Setttlement encompassing the terms of the MOU as agreed to on May 29, 1997. Delaware co-lead counsel has had no negotiation with

counsel for Director Defendants or ADM regarding the payment of fees and/or expenses.

III.

The Benefits Of The Proposed Settlement Versus The Risks of Continued Litigation

27. There is no doubt on the part of Delaware Counsel that, if approved by this Court, the proposed settlement will confer upon ADM substantial benefits, particularly in the area of corporate compliance, which, in turn, will benefit ADM shareholders. It is respectfully submitted that the proposed settlement is an excellent result because it addresses and resolves the very issues raised in both the Illinois Action and Delaware Action regarding board supervision, monitoring, reporting, and independence, as well as provides for a monetary fund (paid for on behalf of the Director Defendants by their insurance carriers) to finance (among other things) implementation of many of the corporate compliance procedures and mechanisms. Thus, the proposed settlement confers substantial benefits, at no cost to the Company.

28. When compared with the result reached through the proposed settlement, continuing the litigation would be extremely risky to plaintiffs in view of the arguments and supporting case law raised by the Director Defendants and the Company in their motions to dismiss. Although Delaware plaintiffs believe that their claims have merit, issues such as demand futility and the exculpatory § 102 (b)7 provision always foster a certain degree of uncertainty as to whether derivative claims will survive dismissal. There is never a guarantee that plaintiffs will be successful in convincing the Delaware Court that demand is futile, or that the conduct of defendants, as pled, is not shielded by the exculpatory provision contained in ADM's Certificate of Incorporation. Accordingly, Delaware co-lead counsel believe that the proposed settlement is in the

best interests of ADM shareholders, and should be approved.

IV.

The Fee Petition

29. Delaware co-lead counsel did not negotiate the fee and expense award requested by Illinois plaintiffs' counsel —*i.e.*, up to 49% of the $8 million Settlement Fund, or $3,920,000. Delaware co-lead counsel submit that an award of 49% of the Settlement Fund would seriously deplete the Settlement Fund and impair the Audit Committee's ability to perform its functions in connection with the implementation of the programs, procedures and measures required by the proposed settlement.

30. Rather, as set forth above, Delaware co-lead counsel request that a total fee (including expenses) be awarded in the amount of $2,664,000, representing 33⅓% of the $8 million Setttlement Fund amount. Delaware Counsel further request that the total award be allocated equally between Delaware and Illinois plaintiffs' counsel, or $1,332,000 to each, plus interest.

31. As fully set forth above, as well as in the accompanying Memorandum on Behalf of Delaware Plaintiffs in Support of the Proposed Settlement and Award of Fees and Expenses (the "Memo"), Delaware Counsel submit that not only is a 33⅓% award fair and reasonable, but also that an equal division of the award is similarly fair and reasonable in this situation where there is no basis to elevate the contributions made by one set of lawyers over the other. The mere fact that Illinois co-lead counsel had been negotiating with defendants and ADM counsel prior to Delaware co-lead counsels' knowledge or involvement, should not in any way detract from the substantial contributions which Delaware Counsel have made to the proposed settlement. Indeed, the length of time spent in negotiations should not be the sole measure of the degree or value of the contribution made. Instead, warranted here is the recognition that all counsel devoted their best

efforts, with equal vigor and diligence, to achieve an excellent result through their respective contributions. Thus, an equal division of the award should be granted.

32. As shown in the accompanying Memo, determination of a fair fee must also include consideration of the contingent nature of counsels' retainer and of the extent of the difficulties and uncertainties which were overcome in obtaining the settlement.

33. Here, counsel agreed to prosecute this case on a wholly contingent basis. Counsel knew from the outset that they might expend hundreds of thousand [*sic*] of dollars worth of attorneys' time in pursuing this action, yet receive no compensation whatsoever if the action ultimately proved unsuccessful.

34. This affidavit and the Memo describe the substantial risks of litigation. Those same difficulties also constitute risks that counsel might never be paid for their efforts.

35. As detailed in the individual affidavits of Delaware Counsel, Exhibits "1" through "21" contained in the accompanying Appendix to this affidavit (the "Appendix"), professionals in the firms representing Delaware plaintiffs collectively expended over 4,959.36 hours since the inception of the Delaware Action through May 30, 1997, with no assurance of success. In addition, Delaware Counsel have expended a total of over $103,203.81 in unreimbursed expenses (see Exhibits "1" through "21" in the Appendix). Although a litigation fund created in the Delaware Action, to date, holds $16,154.86, it is anticipated that those funds will be depleted to pay for the expenses incurred in connection with Delaware co-lead counsels' appearance in Urbana for the Settlement Hearing, as well as expenses incurred in the preparation of this application, including photocopying and secretarial overtime. A breakdown by law firm involved in the Delaware Action of fees and expenses through May 30, 1997, is as follows:

	Law Firm	Hours	Lodestar	Expenses
1.	Bernstein Liebhard & Lifshitz	1,089.25	$361,756.25	$16,822.15
2.	Weschler Harwood Halebian & Feffer LLP	1,117.60	357,084.00	15,971.00
3.	Zwerling, Schachter & Zwerling, LLP	1,265.00	408,119.50	26,056.28
4.	Berman, DeValerio & Pease, LLP	47.90	13,720.50	1.075.57
5.	Jeffrey Boxer Associates	31.00	10,850.00	83.00
6.	Burt & Pucillo	159.75	50,955.00	4,627.51
7.	Finkelstein, Thompson & Loughran	243.50	78,968.75	5,558.80
8.	Gilman & Pastor	47.00	13,410.00	1,971.18
9.	Girard & Green, LLP	13.50	4,725.00	1,623.90
10.	Gordon & Kaplan	59.91	19,568.50	603.00
11.	Law Offices of James V. Bashian	124.20	39,845.00	2,266.89
12.	Law Offices of A. Arnold Gershon, P.C.	8.25	3,506.25	00.00
13.	Law Offices of Charles J. Piven, P.A.	8.20	2,706.00	1,110.95
14.	Law Offices of Miles M. Tepper	96.50	39,897.50	3,985.90
15.	Law Offices of Curtis V. Trinko, LLP	84.90	21,539.50	4,327.26
16.	Meyers & Milewski, P.C.	67.00	17,575.00	306.00
17.	Phillips, Goldman & Spence, P.A.	52.50	9,206.50	898.36
18.	Pomerantz Haudek Block & Grossman	33.00	10,500.00	1,775.66
19.	Rosenthal, Monhait, Gross & Goddess, P.A.	100.65	33,640.00	2,659.70
20.	Schoengold & Sporn, P.C.	124.75	44,901.25	4,389.89
21.	Schubert & Reed, LLP	185.00	48,868.00	7,090.81
	TOTAL	4,959.36	1,591,342.50	103,203.81

For their investment of time and effort over the course of the past two years, Delaware Counsel will recover only 77% of their actual time, assuming this Court grants Delaware Counsels' petition.

36. The expertise and experience of counsel is another important factor in setting a fair fee. The expertise and experience of plaintiffs' counsel in the Delaware Action is also described in Exhibits "1" through "21" in the Appendix. As shown therein, Delaware Counsel are experienced and skilled practitioners in the securties litigation field, and are responsible for numerous significant settlements, as well as legal decisions that enable litigation such as this to be successfully prosecuted.

37. Courts have repeatedly held that it is in the public interest to have experienced and able counsel enforce the regulations pertaining to the duties of officers and directors of public companies. Vigorous private enforcement of state corporation laws can only occur if private plaintiffs can obtain parity representation with that available to large institutional interests. If this imporant public policy is to be carried out, the courts must award fees which will adequately compensate private plaintiffs' counsel, taking into account the enormous risks undertaken with a clear view of the economics of a contingent derivative action.

38. When Delaware Counsel undertook to act for the plaintiffs in the Delaware Action, it was with the knowledge that we would spend many hours of hard work against some of the best defense lawyers in the United States with no assurance of ever obtaining any compensation for our efforts, or even for the overhead of our offices, which is an increasingly substantial consideration. We were aware that the only way we would be compensated was to achieve a successful result. The benefits conferred by this proposed settlement are particularly noteworthy in that they resolve the core issues of both the Delaware Action and Illinois Action despite the existence

of substantial risk and the vigorous defense mounted by the Director Defendants and the Company. Thus, it is respectfully submitted that Delaware Counsels' fee petition be granted.

V.

Objections Received To The Proposed Settlement

39. As stated above, over 243,000 notices were mailed to ADM Record Shareholders; only five objections to the proposed settlement have been received.

40. Objectors John P. Chiara, Peter D. Scott and Mitchell Berns assert that a fee and expense award equaling 49% of the Settlement Fund (or $3,920,000) would be excessive. Mr. Berns further asserts that 15-20% of the Settlement Fund would be an adequate fee award. However, as set forth above, Delaware Counsel have expended time and expenses which exceed the award that we seek. In any event, Delaware Counsel submit that based on all of the foregoing, a fair and reasonable fee and expense award of the Settlement Fund with an equal allocation between counsel for Delaware plaintiffs and counsel for Illinois plaintiffs.

41. Objectors Charles W. Pauly, Jr. and Elizabeth D. Pauly (the "Pauly Objection") assert, in the alternative, that if plaintiffs' case has merit, the monetary portion of the proposed settlement is inadequate; if plaintiffs' case has no merit, they assert, that the proposed settlement does nothing to enhance shareholder value, is being paid for nuisance value, and that the case should, in any event, go to trial.

42. The Pauly Objection reflects a lack of understanding not only of the principal claims asserted in the Delaware Action and the substantial benefit obtained here, but also, of the considerable risks of going forward with the litigation, as detailed above.

43. The bases for the principal claims in the Delaware Action relate to a lack of a corporate compliance system to monitor and oversee employee conduct, as well as a lack of independence of a majority of ADM's board members because of their personal and business inter-relationships. The proposed settlement addresses and resolves those claims. Among other things, it requires that the Board be comprised of a majority of outside directors, it defines what constitutes an outside director, and it requires that a procedure for corporate compliance be instituted in the form of corporate information gathering and reporting regarding compliance with ADM's policies and procedures, as well as compliance with all federal and state laws. In addition, the proposed settlement creates a Settlement Fund of $8 million dollars from which payments are to be made to pay for implementing these new corporate procedures and practices, including payments for outside independent counsel, as well as to pay plaintiffs' counsel in the derivative actions. Most impressive is that the monies paid to the Settlement Fund come from insurance carriers on behalf of the Director Defendants, and not from the Company.

44. To suggest, as the Pauly Objection does, that a trial on the merits is the better alternative than this proposed settlement, lacks the appreciation of the significant legal obstacles Delaware Counsel face in overcoming the motions to dismiss, as well as the substantial benefits obtained through the proposed settlement.

45. Objectors John J. Gilbert and Martin Glotzer assert that the proposed settlement is lacking because it omits a provision adopting cumulative voting procedures. As this objection admits, a proposed provision for cumulative voting appeared in the last proxy statement of ADM and did not receive enough votes to pass. It is submitted that the issue of cumulative voting, as set forth in the objection, is best left to inclusion in a proxy statement

for vote by all shareholders. Since the proposed settlement requires that a majority of the board be outside directors, as defined therein, it is further submitted that concerns regarding a non-independent board have been addressed and resolved.

CONCLUSION

Based on the facts and circumstances of this case, the significant risks and burdens faced by plaintiffs if the Delaware Action were to proceed, and the substantial procedures regarding corporate compliance which the Director Defendants and ADM have agreed to implement, Delaware Counsel believe that the proposed settlement is fair, reasonable and extremely advantageous to the shareholders, is fully supported by the record in this case, and should be approved. Delaware plaintiffs also respectfully request that Delaware Counsels' application for an award of attorneys' fees and reimbursement of expenses in an amount of 33⅓% of the Settlement Fund ($2,664,000) plus interest be granted with an equal allocation between Delaware and Illinois plaintiffs' counsel.

/s/ Susan Salvetti
SUSAN SALVETTI

[Notary and Appendix Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

AFFIDAVIT OF PROFESSOR JAMES L. BICKSLER IN SUPPORT OF SETTLEMENT OF ARCHER DANIELS MIDLAND COMPANY LITIGATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Professor James L. Bicksler, being duly sworn deposes and says:

I. INTRODUCTION AND SYNOPSIS

1. I am a Professor at Rutgers University—Faculty of Management in the Economics-Finance area and have been at this institution since 1969.

2. The purpose of my Affidavit is to provide corporate governance and shareholder market valuation perspectives relevant to the Archer Daniels Midland Company ("ADM" or the "Company"), including the economic benefits accruing to ADM and its shareholders as a result of the settlement of the derivative actions (the "Settlement"). The discussion of the settlement builds upon and, indeed, is integrated within relevant economic concepts and empirics. Based on economic-financial principles applied to the Settlement, I conclude that the Settlement offers features that will have important long-term benefits for the Company and its shareholders.

3. The organization of the Affidavit is as follows:

Section II discusses my professional qualifications as an expert in the area of financial economics and corporate governance. Section III discusses the nature of the corporation, and the potential conflict between the shareholders and incumbent management. Section IV discusses the roles of the board of directors in corporate governance. A synopsis of some of the relevant literature dealing with the importance of effective corporate governance is provided. A number of interesting empirical observations, including the importance of independent directors, are noted. Section V provides perspectives on both the old structure at ADM. It is noted that the old governance structure at ADM was characterized by cronyism and passivity. As a result of the settlement, there will be an emphasis on independent directors and an information flow from an in-place corporate reporting system. This will result in a much more vibrant corporate governance structure at the Company. Section VI provides an economic understanding of some of the proposed provisions of the settlement and their value-enhancing aspects to the Company and its shareholders. Section VII constitutes the Summary and Conclusions.

II. PROFESSIONAL BACKGROUND

4. My background includes a Ph.D. in finance from New York University. I have previously been a financial economist for Stanford Research Institute, and served on the faculty at the University of Hawaii. I have also been a visiting faculty member at several universities. Also, over the years, I have been a consultant on finance-investment issues for corporations and governments. Articles, notes and reviews of mine have appeared in the *American Economic Review, Journal of Financial Economics, Economics Journal, Journal of Finance, Journal of Financial and Quantitative Analysis* and *Anti-Trust Bulletin* journals. I am editor of several books on finance and investments.

5. While I have a diverse range of interests within financial economics, my particular areas of interest include market valuation of firms and financial securities, corporate governance and institutional investors, and pension fund issues.

6. I have organized or co-organized several Roundtables, Forums and panels on economic and finance issues ranging from corporate governance to corporate finance, corporate strategy and investment strategy. Some sample Roundtables, Forums and Panels have been:

(a) "The Financial Services Industry: Market Changes and Corporate Strategies"

(b) "Corporate Excellence"

(c) "The Fiduciary Responsibilities of Institutional Investors"

(d) "Corporate Governance, Restructuring and the Market for Corporate Control"

(e) "Corporate Takeovers, Restructuring and The Market for Corporate Control"

(f) "Leverage, Workouts and Bankruptcy"

7. Participants in the conferences that I have organized have included such Nobel Prize in Economics recipients as Paul A. Samuelson, Merton H. Miller, Franco Modigliani and James Tobin. Other notables have been Delaware Chancellor William T. Allen; Steven M. H. Wallman, presently a Commissioner at the Securities and Exchange Commission; Peter Peterson, Chairman, The Blackstone Group, and former U.S. Secretary of Commerce; Richard Syron, Chairman and CEO, American Stock Exchange, and former President of the Federal Reserve Bank of Boston; and John Biggs, Chairman and CEO, TIAA-CREF which has a portfolio maket value of $195 billion.

8. I have provided services as an expert in other shareholder litigations, such as *In re Sears Shareholder Litigation*, No. 88 CH/0009 (Circ. Ct. Cook Cty., Chancery Div. 1988). In that litigation I was asked whether that Settlement, which provided for many corporate governance and outsider director provisions similar to those incorporated here, resulted in significant economic benefits to the company and its shareholders. My affidavit was cited with authority by the Court in finding that, as I had opined, these charges were beneficial to Sears.

III. THE NATURE OF THE CORPORATION: AND CORPORATE CONTROL MECHANISMS

9. The modern corporation is a particular business form that has certain economic advantages in organizing production, marketing and finance and, hence, in maximizing the economic welfare of the firm's shareholders.

10. The normative goal of the corporation is to maximize the price of equity shares for its present shareholders. This normative corporate objective obviates the need to take into account the particular consumption tastes and risk preferences of the individual investors or of the institutional common equity shareholders of a given company.

11. Indeed, one economic advantage of the modern corporation is that decision making can be delegated to corporate managers without the need to specifically elicit the risk and investment preferences of each or any of the many diverse shareholders of the firm. Thus, the usefulness of the shareholder maximization rule is that it provides a general structure for rational corporate decision making without incurring the burden of the economic costs of shareholder polling. Indeed, one Nobel Memorial Prize in Economic Sciences awardee, Professor Ronald H. Coase of the University of Chicago—School of Law, gives further insights with regard to why there is a corporate form of business organization. Coase argues (*see* Ronald H. Coase, "The Nature of the Firm," *Economica,*

November, 1937) that the corporate firm arises because of the savings in transaction costs, including monitoring costs, in operatting in a market where information is imperfect.[1]

12. One important characteristic of the large publicly traded corporation is the separation of equity ownership (*i.e.*, risk bearing) and decision making (*i.e.*, resource allocation strategy and tactics). A corollary is that corporate executive management may make decisions that are not in the best interests of the shareholders. Furthermore, the executive management team may continue year after year to act in this manner despite their poor performance, because there is relatively little most investors can do to correct this agency problem.

13. One possible way that the interests of shareholders can be protected is through a board of directors, who recognize their fiduciary responsibilities to shareholders. and have or are provided systematic, directed, and relevant information flow through an in-place corporate reporting system from all levels of the corporation.

IV. THE ROLES OF THE BOARD OF DIRECTORS IN CORPORATE GOVERNANCE

14. As mentioned, the monitoring of management decisions by a board of directors—particularly outside directors who have access to systematic, directed, and relevant information flow through an in-place corporate reporting system from all levels of the corporation—is an important mechanism for protecting the interests of the

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1 Coase answers the question as to why corporations as an organization form exist and continue to persist. Coase's answer is "that firms increase efficiency by minimizing the costs of making and monitoring agreements among employees, suppliers and customers, thereby, in turn, lowering the costs of contracting for goods and services." See L. Gordon Crovitz, "Ronald Coase, Practical Economists: A Nobel Prize for Privatization, Property Rights and Contracts," Barron's, October 28, 1991.

shareholders and making sure executive management performs its fiduciary duties to the shoreholders.

15. Chancellor William T. Allen of the Delaware Chancery Court, and a leading judicial scholar on corporate law, has discussed a board's duty to insure that each director receives information sufficient to satisfy his/her responsibility and that systems be in place to achieve this goal. Specifically in the *Caremark* decision, Chancellor Allen held "it is important that the board exercise a good faith judgment that the corporation's information and reporting system is in concept and design adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations, so that it may satisfy its responsibility." This is important because, as Chancellor Allen notes, "I am of the view that a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists and that failure to do so under some circumstances may render a director liable for losses caused by non-compliance with applicable legal standards." (*See* William T. Allen, *In re Caremark International Inc. Derivative Litigation,* Consolidated Civil Action No. 13670, September 25, 1996.)

16. Dennis Block and Jonathan M. Hoff comment on the *Caremark* decision of Chancellor William T. Allen. They note that board directors do have oversight responsibilities, and that the corporate directors have a duty of care to act on an informed basis, which relates to the presence of information flow and from and in-place corporate reporting system. Thus, the *Caremark* decision points to corporate directors having fiduciary duties to perform monitoring functions based on information flows gathered by corporate in-place reporting systems. (*See* Dennis J. Block and Jonathan M. Hoff, "Duty of 'Caremark' Directors' Oversight Function," *New York Law Journal,* November 21, 1996.)

17. The importance of the *Caremark* decision by Chancellor William T. Allen has been far-reaching. For example, *Caremark* has already effected "proper governance" in the financial services-banking area. In this regard, Mr. Serino, Deputy Chief Counsel—Office of the Comptroller of the Currency, has indicated the importance of an internal ethics compliance program and that "institutions that adopt an effective compliance program can look to a reduction of fines and reduced jail time for its officials over those who don't." (*See* James Del Guerico, *Southern California Business*, April 1, 1997.)

18. In commenting on *Caremark*, it is noted that a "proper" corporate governance framework of today stresses the importance of compliance with particular emphasis on the corporate directors providing an independent check on whether the executive management team has set up an in-house corporate reporting and compliance system. (*See* Richard S. Gruner, "Director and Officer Liability for Defective Compliance: Caremark and Beyond," in Carole W. Basri, Joseph E. Murphy and Gregory J. Wallance, *Corporate Compliance After Caremark*, Practising Law Institute, New York, N.Y., 1997.)

19. The substantial implications of *Caremark* for directors has been pointed out by numerous authors. After all, Chancellor Allen pointed out that "a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so . . . may . . . render a director liable for losses caused by non-compliance with applicable legal standards." It puts an important responsibility on directors to be accountable for an in-place, two-way compliance reporting system. This means that there are to be regular reports to the director and board, evaluating and assessing its adequacy and any potential problems that might arise from this system.

20. Interestingly, the present Chief Justice of the Delaware Supreme Court, E. Norman Veasey, writing before his appointment had much the same idea that Chancellor Allen stated in *Caremark* inasmuch as he stated:

> "There is a belief that 'recommended corporate practice' involves some monitoring or supervision, at least to ensure compliance with the law. If the expected role of a director has grown to include the installation of mechanisms to endure compliance with laws, good counselling suggests that it be done."

(*See* E. Norman Veasey and Julie M.S. Seitz, "The Business Judgment Rule in the Revised Model Act, the Trans Union Case, and the ALI Project—A Strange Porridge, *Texas Law Review*, 1985.

21. Professor Eugene Fama of the University of Chicago has suggested that external or outside directors may be more effective than internal or inside directors. Professor Fama argues that outside directors are concerned with protecting or enhancing their professional reputations as competent managers and typically owe less allegiance to incumbent management than inside directors. Hence, outside directors are more likely than inside directors *not* to rubber-stamp corporate strategies that might lower the market price of common stock. Thus, Professor Fama's reasoning suggests that the monitoring of corporate performance by outside directors may be a low cost, relatively efficient mechanism for improving corporate governance and firm performance. (*See* Eugene F. Fama, "Agency Problem and the Theory of the Firm," *Journal of Political Economy*, April, 1980.)

22. An important emperical study investigating the differential effect of outside directors versus inside directors in effecting CEO turnover and internal change in corporate control is Michael Weisbach, "Outside Directors and CEO Turnover," *Journal of Financial Economics*, 1988.

23. The Weisbach empirical study is based on a bivaricated sample of firms that are classified as either insider-director dominated or outsider-director dominated. He found that outsider-dominated boards are more prone to monitor incumbent management and to use unfavorable common stock return performance as a basis to remove the incumbent CEO relatively quickly. Professor Weisbach also found that CEO executive management changes result in an increase in equity share prices for companies that have outsider-dominated boards. For insider-dominated boards, such CEO changes do not result in additional positive shareholder value.

24. Thus, the Weisbach and Fama studies provide an economic rationale and empirical support for the general proposition that outsider-dominated boards provide a potentially effective monitoring mechanism.

25. Korn/Ferry International argues that the other important tasks of the board are (1) monitoring financial performance, (2) CEO development, evaluation and succession, (3) monitoring the legal and ethical performance of the corporation and (4) crisis management. (*See* Korn/Ferry International, *Board Meeting in Session*, "Twenty 'Best Practices' Improve Board Performance," New York, N.Y., April, 1997.)

26. The "Keys to Effectiveness" for a board, in the opinion of Korn/Ferry International, are (1) expertise, (2) information, (3) power, (4) motivation and (5) focus.

27. In this regard, Ira Milstein of Weil, Gotshal & Manges has argued "that an independent, attentive board is the grain in the balance that leads to a corporate advantage. A performing board is most likely to respond effectively to a world where the pace of change is accelerating. An inert board is more likely to produce leadership that circles the wagons." (*See* Ira Millstein, *The New York Times*, April 6, 1997.)

28. The conventional view of the responsibilities of corporate directors, in the words of Chancellor William T. Allen, is "badly deficient."

> The conventional perception is that boards should select senior management, create incentive compensation schemes and then step back and watch the organization prosper. In addition, board members should be available to act as advisors to the CEO when called upon and they should be prepared to act during a crisis: an emergency succession problem, threatened insolvency or an MBO proposal, for example.
>
> This view of the responsibilities of membership on the board of directors of a public company is, in my opinion, badly deficient. It ignores a most basic responsibility: the duty to monitor the performance of senior management in an informed way. Outside directors should function as active monitors of corporate management, not just in crisis, but continually; they should have an active role in the formulation of the long-term strategic, financial, and organizational goals of the corporation and should approve plans to achieve those goals; they should as well engage in the periodic review of short and long-term performance according to plan and be prepared to press for correction when in their judgment there is need.

(*See* William T. Allen, Delaware Court of chancery, *Redefining the Role of Outside Directors in an Age of Global Competition*, presented at Ray Garrett, Jr., Corporate and Securities Law Institute, Northwestern University, Chicago, Illinois, April, 1994.)

29. In other words, Chancellor Allen's view of the corporate responsibilities of the board directors includes the duty to monitor the executive management team both broadly and narrowly. This, in turn, requires that there

be systematic, directed, and relevant information flows and the availability, if need be, of a centralized reporting place for employees to report violations of company policy and the law. Obviously, corporate directors have a further need to assimilate this information and act in an informed way to structure and implement strategies and tactics designed to improve the operating results of the company.

30. In summary, corporate boards, if effective, are a tremendously important mechanism to bolster the market price of the stock for the Company and its shareholders. If the corporate directors are effective, then the company will be run efficiently and the shareholders will prosper. This requires, as Chancellor Allen suggests, that there will be systematic, directed, and relevant information flow to the corporate directors and that they take an activist role in strategy formulation and monitoring. If, however, the corporate directors are not effective in formulating and monitoring a meaningful relevant corporate strategy, or in having/creating a systematic, directed, and relevant information flow through a corporate reporting system, and in choosing the best management team to implement the corporate strategy-tactics, the shareholders will suffer a significant wealth loss. Boards are usually more effective from an economic as well as governance standpoint if there are a number of independent, or better yet a majority of independent, board members. However, a corollary of this is that independent directors become much more effective, if there is systematic, directed, and relevant information flow. Indeed, these conclusions concerning the importance of outsider-dominated boards to the company and its shareholders are rigorously established in the literature reviewed in this section. Similarly, the importance of systematic, directed and relevant information flow to outside directors is crucial for outside directors to fulfill their heightened director responsibilities as detailed by Chancellor Allen.

V. THE OLD GOVERNANCE STRUCTURE AT ARCHER DANIELS MIDLAND AND THE NEW GOVERNANCE STRUCTURE AT ARCHER DANIELS MIDLAND

31. The travails of ADM are well known, and have been frequently documented in the financial press in such publications as *Business Week, Fortune, The New York Times* and *The Wall Street Journal.*

32. The core of the events at ADM involved its price-fixing violations. However, beyond the activities leading to its guilty plea with regard to price-fixing, ADM is a sad story of corporate governance gone awry, and one where the board of directors did not fulfill their fiduciary duties.

33. ADM has lacked a systematic, directed and relevant information flow to its directors from senior management relating to the monitoring responsibility of its directors. Indeed, as *Business Week* has noted, the board of directors of Archer Daniels Midland is their pick for the worst board in corporate America. (See John A. Byrne, "The Best and Worst of Boards: Our New Report Card on Corporate Governance," *Business Week,* November 25, 1996.)

34. In addition, the nature of Archer Daniels Midland's problems has, in essence, been a result of a weak, ineffective and incestuous Board of Directors which has failed to exercise its fiduciary duties to put the interest of the corporation and shareholders first.

VI. THE ARCHER DANIELS MIDLAND SETTLEMENT

35. Detailed below is a general description of the Settlement. Specific emphasis is given to the particular provisions of Board Structure and Policies.

36. As to Board Structures and Policies, they deal with a number of issues, including the minimum number

or ratio of outside directors, as well as the definition of what is meant by outside directors, and economic issues involving a conflict of interests or potential conflict of interests.

37. One important provision of the Settlement is that a majority of the board of directors *must* be outside directors. This requirement is far superior to an aspiration; it offers ADM no opportunity or flexibility to circumvent, for whatever reason, the mandate that the majority of directors be outside directors.

38. The definition of outside directors is also specific, rather than simply being vague and ambiguous. It requires that any outside director (1) cannot be a present employee or a former senior executive; (2) does not have any relationship with ADM in a business or professional sense; (3) does not have, with any member of executive management, a relationship via blood or marriage; (4) does not have employment in a company in which the chairman or CEO of ADM is a board member, and (5) does not receive compensation from ADM in any capacity other than that as a director.

39. Another important provision concerns the reporting mechanisms put into place as part of the Settlement. Specifically, senior corporate officers will now be required to report on a regular basis, not less than three times a year, to the Audit Committee regarding compliance with ADM's policies and procedures and all federal and state laws. Additionally, the Audit Committee will report regularly to the full Board of Directors regarding the effectiveness of the Company's monitoring and compliances policies and procedures.

40. The creation of a board having a majority of independent directors, coupled with enhanced board information gathering and reporting systems, has important therapeutic value and value-enhancing consequences for the Company and its shareholders. These provisions will

help ensure that ADM enters the twenty-first century as a model of appropriate corporate governance acting in the best interests of shareholders.

41. Another provision of the Settlement deals with conflict situations involving directors. This provision is anticipatory in the sense that if a potential conflict arises then there is an in-place corporate governance mechanism to deal with this problem. Specifically, this provision indicates that the board of directors will help to anticipate whether there are any possible conflicts of interest. The board will use its judgment to determine on a case-by-case basis whether a board member should be excluded from voting because of a conflict of interest. In all cases where a board vote is required, it shall be the case that the majority of directors will be disinterested and independent regarding the situation where the directors' vote is required.

42. Other important provisions of the Settlement concern the Audit and Governance Committees. The Audit Committee's responsibilities have been enhanced to include monitoring and oversight—*i.e.* whether legal compliance issues have been properly fulfilled. These issues of legal compliance include discrimination, corruption activities in foreign countries environment codes, securities laws, disclosure obligations as well as any anticompetition practices that might lead to criminal or civil prosecution.

43. The composition of the Audit Committee has also been structured in a manner consistent with the principles of "proper" corporate governance. Specifically, the members will consist entirely of outside directors who became board members after June 25, 1995. It will have its own separate outside counsel, which will be hired by this Committee and will have full authority with regard to issues surrounding the law.

44. Another equally important provision is the creation of a Governance Committee. The members of this

Committee will consist of all nonmanagement directors. Its task will be to set performance standards and criteria to evaluate the actual performance of ADM's Chief Executive Officer. The standards and criteria used to evaluate the actual performance of the CEO will be published in the proxy statement for the annual meeting of shareholders.

45. These provisions will result in the Settlement achieving substantial improvements in the governance structure and thus in the accountability of ADM's CEO and executive management. This will likely lead to significantly improved operating cost and economic profit-cash flow performance at ADM and its associated business units. Ergo, it will result in a corporate strategy that will increase the market price of ADM's common stock. Alternatively stated, the Settlement will confer substantial economic benefits upon the Company and its shareholders by better aligning the economic interests of the Company's Board of Directors and the Company's executive management with those of the Company's common shareholders. This will establish a pragmatic basis on which the financial markets can be confident that the ADM executive management team will undertake strategy decisions for the benefit of the Company and its common shareholders. Hence, there will be a higher market price particularly in the long run for ADM common stock as the benefits from improved corporate governance and a value enhancing corporate strategy are made more apparent to investors through the information flows to the financial markets and the reality of these benefits is made apparent to all investors.

46. Interestingly, in my 1991 *Sears* Affidavit submitted to examine the impact of substantially similar corporate governance changes to Sears, Roebuck, my economic assessment of the impact of the changed governance structure was that there were substantial long-run benefits that would flow to the company and the Sears shareholders

from the *Sears* Settlement. This assessment was on target and, in retrospect, predictive of what occurred to the stock price. Alternatively stated, in the Sears litigation, I maintained that there would be substantial economic benefits conferred to the shareholders in the long run as a result of this Settlement. As the *actual* time series of common stock prices of Sears has unfolded, my economic benefit assessment has been uncannily accurate.

47. In the *Sears* case, some of the essential corporate goveranance changes were similar to those here. For example, there was an emphasis on adding new and additional outside directors and that at least 75% of the Board had to be comprised of outside directors and that the key committees were made to be comprised of independent, outside directors. In fact, the foundation of this Settlement was modeled on the *Sears* Settlement that was structured with my assistance. The one important change in the Settlement has been the addition of the corporate information system dimension that is a result of Chancellor Allen's decision in *Caremark*. Specifically, the Settlement has the additional substantial benefit of a systematic, directed, and relevant information flow and in-place corporate reporting system enhancing the effectiveness of the outside board members and the corporate governance structure at ADM.

48. In my *Sears* affidavit, I opined that there was substantial long-term economic benefits that would accrue to the Sears and the shareholders as a result of the Settlement. This economic conclusion is even stronger in the instant case because of the additional benefits obtained here in light of the *Caremark* decision.

VII. SUMMARY AND CONCLUSIONS

49. This Affidavit has presented my economic assessments, as well as the underlying analytical and empirical reasoning why the Settlement confers significant economic benefits upon both the Company and its shareholders.

50. The effectiveness of a corporate governance and compliance structure depends critically on the board of directors. The literature, specifically the Fama and Weisbach papers, provides both the economic rationale and empirical evidence supportive of the importance of outside directors in an effective governance structure.

51. The ADM board of directors has historically been characterized by a weak and ineffective governance structure leading to actions detrimental to the Company and its shareholders.

52. The Settlement improves in several important aspects their governance structure because the board is now required to be comprised of a majority of outside directors. Further, the provisions characterizing the definition of what constitutes an outside director are operationally specific and not open to debate. Also, the corporate governance structure of ADM has been improved through an anticipatory recognition of potential conflicts of interest and the putting in place of an appropriate mechanism for recognizing and dealing with conflicts of interest at the board of directors.

53. Additionally, a systematic, directed, and relevant information flow and in-place corporate reporting system enhances the effectiveness of the outside board members and the corporate governance structure at the Company.

54. Likewise, the Audit and Governance Committees have been structured both in terms of the availability of information and sufficient committee power to make significant contributions that benefit the Company and the shareholders.

55. These important governance structure changes will improve the functioning of ADM's board in meeting its duty of care and in meeting mandates such as good faith attempts to estabilsh corporate information and reporting systems that are contained in Chancellor Allen's decision in the *Caremark* litigation.

56. In summary, the Settlement confers significant corporate governance benefits, which in my opinion will translate into positive long-term value for ADM and its shareholders.

/s/ James L. Bicksler
JAMES L. BICKSLER

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

MOTION FOR FINAL APPROVAL OF THE PROPOSED SETTLEMENT AND PLAINTIFFS' COUNSEL'S JOINT APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

Plaintiffs, by their attorneys, move this Court to enter the Final Judgment and Order of Dismissal, a copy of which is attached to this Motion as Exhibit 1, and the Order Approving Plaintiffs' Counsel's Application for Fees, attached as Exhibit 2, and in support of their Motion, state as follows:

1. On May 30, 1997, the Court entered the Order Preliminarily Approving Settlement and Providing For Notice (the 'Preliminary Approval Order") which preliminarily approved the Stipulation of Settlement (the "Settlement") entered into by and between counsel for the parties to the above-captioned action (the "Litigation") and counsel to a similar action pending in the Delaware Court of Chancery as *In Re Archer Daniels Midland Company Derivative Litigation*, Consolidated No. 14403 (the "Delaware Action").

2. Pursuant to the Preliminary Approval Order, a notice (the "Notice") of the Settlement was mailed to over 243,000 current shareholders of Archer Daniels Midland Co. ("ADM") and a summary notice was published in *The Wall Street Journal* on June 13, 1997.

3. The Notice set July 7, 1997 as the date for a hearing to determine whether the proposed Settlement should

be approved as fair, reasonable and adequate to ADM and its shareholders and whether the Judgment approving the Settlement should be entered and to consider Plaintiffs' Counsel's application for an award of attorneys' fees and reimbursement of expenses, and any objections to the Settlement, the Final Judgment or Plaintiffs' Counsel's application for an award of fees and expenses.

4. Plaintiffs submit the following documents in support of this Motion:

a) Joint Declaration of Terry Rose Saunders and Robert M. Roseman in Support of the Proposed Settlement and Plaintiffs' Counsel's Joint Application for An Award of Attorneys' Fees and Reimbursement of Expenses;

b) Plaintiffs' Memorandum in Support of the Proposed Settlement; and

c) Plaintiffs' Memoradum in Support of Plaintiffs' Counsel's Joint Application For An Award of Attorneys' Fees and Reimbursement of Expenses.

WHEREFORE, plaintiffs move this Court to enter the Final Judgment and Order of Dismissal and the Order Awarding Plaintiffs' Counsel's Fees and Reimbursement of Expenses.

Dated: June 30, 1997

Respectfully submitted,

[Counsel Listing Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

JOINT DECLARATION OF TERRY ROSE SAUNDERS AND ROBERT M. ROSEMAN IN SUPPORT OF THE PROPOSED SETTLEMENT AND PLAINTIFFS' COUNSEL'S JOINT APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

Terry Rose Saunders and Robert M. Roseman declare as follows:

I. INTRODUCTION

1. Terry Rose Saunders is a principal in the firm of Law Offices of Terry Rose Saunders and Robert M. Roseman is a partner in the firm of Spector & Roseman, P.C. Ms. Saunders and Mr. Roseman ("Plaintiffs' Co-Lead Counsel") have been actively involved in the prosecution of this litigation, are fully familiar with the proceedings, and, if called upon, are competent to testify to the matters set forth in this Declaration.

2. We submit this Declaration in support of (a) the proposesd settlement (the "Settlement") of this derivative action between plaintiffs, Paul Felzen, Trustee of Louise Laskin Trust—1991 and Sandra Esner, as shareholders of Archer Daniels Midland Company, nominal defendant Archer Daniels Midland Company ("ADM") and the seventeen individual defendants who were directors of ADM when the events that led to this litigation occurred ("the Director Defendants"), and (b) plaintiffs' counsel's joint application for an award of attorneys' fees and reimbursement of expenses.

3. The parties have entered into this Settlement in good faith and after extended arms-length negotiations by experienced and informed counsel. This Declaration, the Affidavit of John C. Coffee ("Coffee Affidavit") and the Declaration of R. Alan Miller ("Miller Declaration") provide factual support for the conclusion of plaintiffs and their counsel that the Settlement is fair, reasonable and adequate.

4. After two years of litigation, including a hard-fought motion to dismiss and six months of settlement negotiations, the parties have agreed to a Settlement that will result in benefits for ADM and its shareholders that go beyond those which plaintiffs could have achieved through litigation. The Settlement will result in substantial changes in the composition and functioning of ADM's Board of Directors and key Committees. These structural changes are designed to prevent recurrence of ADM's recent problems and change the public perception of ADM.

5. Specifically, the corporate governance measures require ADM to maintain a Board of Directors without ties to management that will be expected to exercise independent judgment and monitor corporate conduct effectively. These measures also require the Audit Committee to take specific steps to ensure that ADM complies with the law. Moreover, the Settlement creates an $8 million fund to be paid from the Directors and Officers Liability Insurance (the "Settlement Proceeds") for the Company to pay for these benefits, including independent outside legal counsel to assist the Audit Committee in its legal compliance tasks, and to pay any award of attorneys' fees and reimbursement of expenses made by this Court.

6. The Settlement is an outstanding result for ADM and its share holders. Not only did plaintiffs face legal and factual obstacles to ultimate success on the merits, but even if successful, they faced the prospect of no recovery. Any amount plaintiffs could hope to recover from the defendants would pale in comparison to the hundreds of millions of dollars ADM has had to spend as the result of its antitrust problems. This Settlement assures that ADM will promptly adopt measures that approximate the "state of the art" in American corporate governance today and will help guard against the significant financial liability that could result from having corporate officers violate criminal or civil laws in the future.

7. This Declaration also provides factual support for the request of Plaintiffs' counsel for an award of attorneys' fees of 40 percent ($3,200,000) of the Settlement Proceeds, and reimbursement of expenses of $76,501.69 to be paid from the Settlement Proceeds. As explained in the Miller Declaration, this amount is a small percentage (2 percent) of the total value of the benefit obtained for ADM and its shareholders (conservatively $158 million). It is also less than the amount of attorneys' fees and expenses that ADM has agreed not to oppose.

8. The fairness and adequacy of the Settlement and plaintiffs' counsel's request for fees and expenses are confirmed by the favorable response to the Settlement to date by ADM shareholders. Over 243,000 Notices of the hearing on the Settlement have been mailed to ADM's shareholders. As of June 27, 1997, five objections to the Settlement or the award of attorneys' fees have been received.

II. HISTORY OF THE LITIGATION

A. *Background Events.*

9. Two years ago, agents of the Federal Bureau of Investigation and the Antitrust Division of the Department of Justice arrived at the homes of numerous ADM executives and managers and ADM's corporate headquarters. The government sought documents to support

its ongoing, but previously undisclosed, investigation into charges that ADM was fixing prices of citric acid, high-fructose corn syrup ("HFCS") and lysine. Two weeks later, *The Wall Street Journal* reported that the FBI had been investigating ADM since 1992, when Mark Whitacre, a senior executive of ADM, approached the FBI concerning price fixing activities in which he claimed to be involved at ADM. Early reports stated that the government had videotaped Michael Andreas, the Company's Vice-Chairman and son of Dwayne Andreas, ADM's Chairman and Chief Executive Officer, and Terrance Wilson, President of the ADM Corn Processing Division and Group Vice President, meeting with competitors to discuss plans to limit the production of lysine. These press reports further disclosed that Howard Buffett had resigned from ADM's Board of Directors in early July "because he was troubled by the investigation and the way the Company was handling it", and because he had "lost confidence in whether he was being accurately informed by other [ADM] executives about the details of the antitrust matter." This news fueled concern about whether ADM, long criticized for being run as a "family fiefdom" of Dwayne Andreas, would respond appropriately to the investigation.

10. Shortly after the government investigation was disclosed, purchasers of ADM's lysine, high-fructose corn syrup and citric acid brought civil antitrust class actions alleging that ADM and others had violated the federal antitrust laws by agreeing to fix prices and allocate or limit production. In addition, ADM shareholders commenced class actions against ADM and certain officers for violating the federal securities laws by misrepresenting the Company's earnings, profitability, results of operations and business prospects in connection with the sale of ADM's common stock. ADM's common stock price had dropped approximately 15% from $18.625 per share on June 26, 1995, the day before the FBI raids, to $14.28 per share on July 10, 1995.

11. Whitacre had also alleged that ADM rewarded top executives with foreign pay deposited in overseas accounts. According to Whitacre, these so-called slush funds were part of a Company policy and were common knowledge to senior executives.

B. *Plaintiffs Commence This Action.*

12. The plaintiffs in this action are current shareholders of ADM who also held ADM stock in June 1995. Plaintiff Paul Felzen, Trustee of Louise Laskin Trust—1991, filed his complaint on July 11, 1995 in the United States District Court for the Northern District of Illinois. Plaintiff Sandra Esner filed her complaint on the same date in the Circuit Court of Cook County, Illinois. Deidra Graulich filed a second federal court complaint on July 12, 1995, in the Northern District of Illinois. On August 7, 1995, defendants removed the *Esner* Action to the United States District Court for the Northern District of Illinois.

13. The derivative complaints alleged that the Director Defendants breached their fiduciary duties to the Company and its stockholders by causing ADM to violate federal antitrust and securities laws and failing to monitor ADM's operations and employees to prevent violations of the law. On August 4, 1995, the defendants moved to transfer the *Felzen* and *Graulich* actions to the Central District of Illinois. Defendants added the *Esner* action after it was removed. Plaintiffs opposed the transfer.

14. After conducting significant additional research and analysis of publicly available information about ADM and its directors, plaintiffs Felzen and Esner filed a Proposed Consolidated and Amended Derivative Complaint (the "First Consolidated Complaint") on September 29, 1995, and named as defendants Dwayne O. Andreas, Ralph Bruce, John H. Daniels, Howard G. Buffett, Lowell W. Andreas, James R. Randall, Michael D. Andreas,

H.D. Hale, O. Glenn Webb, Martin Andreas, Margaretta Rockefeller, F. Ross Johnson, Ray A. Goldberg, John K. Vanier, Shreve M. Archer, Jr., M. Brian Mulroney and Robert S. Strauss (the "Director Defendants"). The First Consolidated Complaint alleged that the Director Defendants (1) breached their fiduciary duties by participating in illegal price-fixing or not properly monitoring ADM's personnel and operations to prevent illegal price-fixing and illegal foreign payments and (2) grossly mismanaged ADM.

15. The First Consolidated Complaint also alleged that, during the time period of the antitrust conspiracy, Dwayne Andreas, ADM's Chairman and Chief Executive Officer, dominated and controlled the Board. Many ADM Board members were Andreas family members or friends, Company officers, close relatives of Company officers, or had ties with the Andreas family that raised serious questions as to whether the Board had performed its role properly or had been properly diligent. Plaintiffs alleged that these relationships made it highly unlikely that the Board would take effective action to investigate and remedy wrongdoing by Company executives. On October 17, 1995, plaintiff Deidra Graulich voluntarily dismissed the *Graulich* Action without prejudice.

16. Defendants moved to dismiss the First Consolidated Complaint or, in the alternative, to stay the action on October 31, 1995. On that same date, the United States District Court for the Northern District of Illinois ordered that the litigation, along with pending shareholder securities class actions, be transferred to the United States District Court for the Central District of Illinois. The litigation was subsequently transferred.

17. Defendants refiled their motion to dismiss or, in the alternative, to stay the action in the Central District Court on December 27, 1995. Defendants argued that plaintiffs had failed to make a demand upon the directors

of ADM as required by Delaware law before bringing their action, that plaintiffs failed to state a claim for relief against the defendants and that, Article XIV of ADM's Certificate of Incorporation shielded the defendants from liability for the misconduct plaintiffs alleged because it involved only a breach of their duty of care.

18. Shortly after the transfer order, plaintiffs served a document request on defendants. At a status hearing before the Court on February 26, 1996, the Court ruled that plaintiffs in the class and derivative shareholder actions were entitled to discovery of documents defendants had produced to the government or that the government had seized and that plaintiffs could request additional documents. Plaintiffs counsel reviewed and catalogued the tens of thousands of documents defendants produced but many categories of documents plaintiffs needed to prove their case were not produced. When plaintiffs sought additional limited discovery, defendants objected and filed a motion for a protective order to forestall any further discovery.

19. This litigation quickly focused on the issues defendants raised in their motions to dismiss and, in particular, whether plaintiffs were required to make demand on ADM's Board before bringing this action and whether defendants were shielded from liability under Delaware law because they had acted in good faith. Defendants' motions to dismiss the First Consolidated Complaint and for a protective order, both of which had been fully briefed, were set for hearing on April 26, 1996. At that hearing, the Court granted defendants' motion to dismiss without prejudice and gave plaintiffs leave to amend.

C. *The Consolidated and Amended Derivative Complaint.*

20. Plaintiffs filed a Consolidated and Amended Derivative Complaint (the "Complaint") on May 17, 1996.

By that time, Mark Whitacre had disclosed many of the details of the price-fixing activities in which he claimed that he and others at ADM had been involved. Whitacre disclosed meetings that he, Michael Andreas and Terrance Wilson attended with ADM's competitors in the lysine business where prices and market allocation were discussed. Whitacre stated publicly that illegal price-fixing was "fairly common" at ADM and had been going on since the early 1990's. Whitacre referred to comments made by the Company's President and its General Counsel, indicating that they were aware of price-fixing at the Company. Whitacre's accounts portrayed a corporation rife with criminal conduct at the highest levels and implicated one director, M.D. Andreas, directly and two others, Dwayne Andreas and James Randall, indirectly. Moreover, ADM continued to receive low marks from corporate governance experts and institutional shareholders, such as the California Public Employees' Retirement System ("CalPERS"), for its lack of both responsiveness to shareholders and Board independence.

21. The Complaint contained the results of counsel's review and analysis of the additional publicly available information on ADM and the Director Defendants. This case was unusual in that senior officials of the Company, with close ties to ADM's Board, were being investigated for criminal conduct and had exposed the Company to hundreds of millions of dollars in potential fines and damages. The Complaint incorporated this information in support of allegations that Michael Andreas, Dwayne Andreas and James Randall participated or assisted in the wrongdoing and that all directors were responsible for the wrongdoing at ADM because they had neither fulfilled their duties to prevent, detect and seek redress for criminal conduct nor exercised independent judgment in their oversight responsibilities.

22. With leave of the Court, plaintiffs filed a Supplement to the Complaint in November 1996 and an Amend-

ment and Supplement to the Complaint in December 1996. The Supplement updated the Complaint. The Amendment and Supplement to the Complaint alleged that the Director Defendants—other than Howard Buffett —had further breached their fiduciary oversight duties by failing to cause ADM to cooperate with the government in its investigation and minimalize criminal liability by demonstrating that ADM intended to remedy, prevent reoccurrence of, and seek redress for wrongdoing.

D. *Defendants' Further Motions to Dismiss and Objections to Discovery.*

23. Defendants moved to dismiss the Complaint on June 7, 1996. This motion was fully briefed. Defendants argued that plaintiffs had failed to make a pre-suit demand on ADM's Board of Directors as required by F. R. Civ. P. 23.1 and that demand was not excused in this case. Although agreeing that the relevant standard was whether the allegations of the complaint create a reasonable doubt that the Board could have exercised its independent and disinterested business judgment in responding to demand, the parties differed as to whether a majority of the Board could exercise such judgment.

24. Defendants also argued that the Complaint failed to state a claim for relief against 14 of the 17 Director Defendants because factual support necessary to show their misconduct was not alleged. In February, 1997, defendants filed a Supplemental Memorandum in Support of the Motion to Dismiss, arguing that plaintiffs' new allegations relating to the Board's failure to cooperate with the government should be dismissed because plaintiffs had failed to make demand on the Board and the new allegations failed to state a claim for relief. Defendants also argued that ADM's Certificate of Incorporation shielded the Director Defendants from liability for the new allegations as well.

25. While the motion to dismiss was pending, plaintiffs renewed their requests for documents. Defendants again objected to producing the requested documents because they had moved to dismiss the Complaint. Plaintiffs filed a motion to compel production of documents, and this motion was fully briefed.

26. The Court has not ruled on the motion to dismiss or the motion to compel and has adjourned argument on both motions pending the hearing on the Settlement.

27. In late October, 1996, plaintiffs sought discovery relating to ADM's wrongdoing from the Department of Justice, but the government refused to produce any of the evidence it possessed.

E. *ADM's Response to the Government's Investigation and Civil Litigation.*

28. After this lawsuit was commenced, ADM responded to charges of price-fixing in ADM products and criticism of its Board.

(a) ADM's Board appointed a Special Committee of outside directors to oversee the Company's response to the government's investigation and related civil litigation. In April, 1996, ADM announced that it had agreed to pay $25 million to settle the lysine civil antitrust case. On September 27, 1996, ADM announced that it had agreed to pay $35 million to settle the citric acid civil antitrust case. ADM also announced that it had agreed to pay $30 million to settle the federal securities class action brought by ADM stock purchasers.

(b) In October 1995, ADM's Board created the Corporate Governance Committee to review and make recommendations on corporate governance matters, such as Board structure and director qualifications. The Committee reported its recommendations to the Board on January 15, 1996. Subsequently, the Board reduced the number of directors, several directors, including Michael Andreas, did not stand for re-election, and the Board nominated three new outside directors for the 1996 term. Michael Andreas also took a leave of absence from the Company.

29. On October 15, 1996, ADM entered into a plea agreement with the United States Department of Justice in which ADM agreed to plead guilty and pay a $100 million criminal fine for fixing prices in the lysine market from June, 1992 through June 27, 1995 and for fixing prices in the citric acid market from January, 1993 through June 27, 1995. As part of the plea agreement, ADM agreed to cooperate with the government in current federal investigations of antitrust schemes. In return, the government agreed not to bring criminal charges against any current director, officer or employee of ADM (other than Michael D. Andreas and Terrance S. Wilson) for any antitrust violations covered in the ongoing investigations. There has been no evidence that any director of ADM, other than Michael Andreas, was aware of any price-fixing activities, or that the ADM Board systematically failed to exercise its oversight responsibilities.

III. SETTLEMENT NEGOTIATIONS AND THE SETTLEMENT

A. *Negotiation Of The Settlement And The Role Of Plaintiffs' Co-Lead Counsel In Implementing Corporate Governance Reforms At ADM.*

30. By the Fall of 1996, Plaintiffs' Co-Lead Counsel had concluded that ADM and its shareholders would be best served by a settlement that would change ADM's corporate governance and legal compliance rather than by protracted and uncertain litigation aimed at a monetary recovery for ADM. As of this time, the Company

had agreed to pay $190 million in criminal fines and in settlement of civil antitrust and securities class actions. ADM had made certain changes to the Board's membership after receiving the report of the Corporate Governance Committee. Plaintiffs' Co-Lead Counsel also recognized that, even if plaintiffs prevailed on the issue of demand futility—which was not certain—they would have difficulty demonstrating the defendants' willful or systematic failure to oversee the Company's operations necessary to establish liability under Delaware law. Moreover, Plaintiffs faced the likelihood the Company would create a special litigation committee to investigate director liability for the claims in this litigation—an action that would result in delay and could result in a decision to dismiss the litigation. Finally, Plaintiffs' Co-Lead Counsel took into account the primary interest of many ADM shareholders, including large institutional shareholders, which was to force changes in the way ADM's Board—and therefore ADM—functioned. With this background, Plaintiffs' Co-Lead Counsel contacted counsel for defendants and ADM in September 1996 to initiate settlement discussions. Plaintiffs' Co-Lead counsel were told that the defendants were not prepared to discuss settlement at that time.

31. After the Company entered into its plea agreement with the government and shortly before the November hearing on defendants' motion to dismiss and plaintiffs' motion to compel, defendants' counsel contacted Plaintiffs' Co-Lead Counsel to suggest continuing the hearing date to allow the parties to explore a possible settlement. Accordingly, Plaintiffs' Co-Lead Counsel began to prepare a settlement proposal to present to defendants. At the same time, however, Plaintiffs' Co-Lead Counsel pressed forward with the litigation and filed two additional pleadings.

32. At the outset, Plaintiffs' Co-Lead Counsel presented corporate governance measures that institutional

shareholders had requested and organizations and professionals who specialized in corporate governance had recommended, and other demands to ensure an environment at ADM that promoted Board independence and compliance with the law. Plaintiffs' Co-Lead Counsel were aware that, at ADM's October 1996 shareholder meeting, approximately 42% of ADM's shareholders had voted in favor of an amendment to ADM's by-laws to require a more restrictive definition of an outside director. ADM's Board had recommended a vote against the proposal. Also, 47% of the shareholders had voted in favor of a proposal requiring confidential voting, which ADM's Board also opposed. Both these proposals had been offered by large institutional shareholders. Although ADM's Board had nominated three new independent directors who were elected at the 1996 annual shareholders meeting, the Board had not implemented many of the recommendations of its Governance Committee; and ADM's Audit, Nominating and Compensation Committees were not comprised exclusively of outside directors.

33. Plaintiffs also sought a monetary contribution to the Company from the Director Defendants as part of the Settlement. Plaintiffs' Co-Lead Counsel received ADM's Directors and Officers Liability Insurance in effect when the litigation was commenced. The policy contained a $10 million policy limit and an exclusion for all claims, including derivative actions, arising from antitrust actions or proceedings.

34. Immediately prior to the December 11, 1996 hearing on pending motions, Plaintiffs' Co-Lead Counsel met with defendants' counsel to present plaintiffs' settlement demands. This framework Plaintiffs' Co-Lead Counsel established for a settlement was how best to strengthen the independence of the Board, prevent reoccurrence of the kind of problems ADM had experienced, and demonstrate to shareholders and the public that ADM was committed to good corporate governance. To this end, plaintiffs made a number of demands that included:

—Adopting the definition of outside director that 42% of ADM's shareholders had voted for;

—Establishing procedures for ensuring that future Board candidates were independent;

—Creating new Board Committees of outside directors with authority to investigate allegations of past misconduct, review current compliance and ensure future compliance with the law;

—Retaining outside independent counsel to assist these two new Committees;

—Requiring confidential voting;

—Retaining claims against Michael Andreas;

—The resignation of Dwayne Andreas as CEO and Chairman; and

—Some form of restitution to the Company by the Director Defendants for amounts expended to resolve criminal charges and civil litigation.

35. After two meetings in December 1996, one in Chicago and one in Washington, at which the parties negotiated plaintiffs' demands, plaintiffs submitted a written settlement proposal to defendants that contained the corporate governance measures presented and discussed at meetings between counsel, including the retention of independent counsel to assist Board Committees, a requirement that claims against Michael Andreas not be released and provision for some recoupment of monies to the Company, depending on the outcome of negotiations between defendants and the insurance carrier.

36. In connection with the negotiations, Plaintiffs' Co-Lead Counsel met separately with ADM's largest institutional shareholders, namely Kayla Gaylin, the general counsel of CalPERS, John Lukomnick, the Deputy Comptroller for Pensions of New York City, who has responsi-

bility for the City's pension fund investments, Bart Naylor of the Teamsters Pension Fund and Edward Durkin of the Carpenters Pension Fund, to solicit their views and review plaintiffs' proposals. In addition, Plaintiffs' Co-Lead Counsel spoke with Ann Hanson and Ann Yeager of the Council of Institutional Investors. These views, which primarily related to the definition of an outside director, were taken into account and, to the extent feasible, incorporated in plaintiffs' proposals. Plaintiffs' Co-Lead Counsel recognized that not all of these views could be implemented through the settlement of this litigation and continued to focus on institutionalizing measures and procedures that would provide the framework for an independent Board and an exemplary legal compliance program.

37. Throughout the negotiations, Plaintiffs' Co-Lead Counsel consulted with Professor John Coffee, Adolf A. Berle Professor of Law at Columbia University Law School, to make sure that the corporate governance measures being discussed were meaningful and of value to the Company. Plaintiffs' Co-Lead Counsel also consulted with R. Alan Miller, President of the Philadelphia Investment Banking Company, who provided an economic analysis of the settlement's value to ADM and its shareholders.

38. During negotiations, defendants' counsel reviewed with Plaintiffs' Co-Lead Counsel the in-depth and far-reaching study that ADM's Corporate Governance Committee had made of the current thinking on corporate governance before makings [*sic*] its recommendations to ADM's Board. For example, although Plaintiffs' Co-Lead Counsel believed the definitions of an outside director they proposed were more restrictive than those ADM's Governance Committee proposed, this was not always the case. After two further meetings, the parties reached an agreement on the definition of an outside director that took into account all parties' concerns and, significantly, defendants agreed to amend ADM's By-Laws to include

this definition and a statement of Board policies designed to ensure an independent Board.

39. As negotiations continued, plaintiffs also agreed to modify certain proposals, but the core demands remained intact. For example, plaintiffs insisted on restricting membership on the Audit and Nominating Committees to outside directors who had not been on the Board in June 1995, although this meant certain directors could not continue to serve on these Committees. The demand that claims the Company may have against Michael Andreas not be released raised further issues with the insurance carrier which was insisting that, if it acknowledged coverage, all defendants release any claims for further coverage in return for a payment on their behalf to settle this litigation.

40. Although ADM's counsel had declined a settlement proposal requiring Dwayne Andreas or any other individual defendant to resign, or the election to the Board of any particular individual, Plaintiffs' Co-Lead Counsel were advised that the Company would announce a significant change in Board structure and composition, consistent with plaintiffs' settlement demands for measures to create an independent Board, after the April 17, 1997 Board meeting. Indeed, on April 17, ADM announced that: Dwayne Andreas had retired as Chief Executive Officer of the Company; Lowell Andreas had retired from the Board; and former Ambassador Andrew Young had been elected to the Board. The Board also named G. Allen Andreas to be Chief Executive Officer and a member of the Board. These announcements complemented plaintiffs' settlement strategy of requiring ADM to implement structures and procedures for good corporate governance. Throughout the negotiations, defendants continued to update plaintiffs on the status of their negotiations wtih the insurance carrier over the coverage dispute. At the final stages of the negotiations between the parties, defendants advised plaintiffs that the carrier had finally agreed to pay $8 million on behalf of defendants.

41. After five months of arms-length negotiations between the parties, both face-to-face and by telephone, the parties agreed to a settlement that provided for corporate governance measures and procedures, the creation of a settlement fund of $8 million in cash to be paid into an interest bearing escrow account by the carrier, and the retention by the Company of any potential claims against Michael Andreas. On April 25, 1997, counsel for the parties began negotiations over the terms of a Memorandum of Understanding that would be the basis of a Stipulation of Settlement.

42. Even after the parties reached an agreement in principle, and they had agreed on the terms of the Memorandum of Understanding, they had to resolve how to dispose of a similar derivative action that was pending in Delaware. Because ADM's insurance carrier insisted on the dismissal of the Delaware action and ADM's directors insisted on a global settlement, Plaintiffs' Co-Lead Counsel sought to include the Delaware action in the Settlement. This required Plaintiffs' Co-Lead Counsel to meet with counsel for plaintiffs in the Delaware action and to hold further discussions with counsel for defendants and the Company. The result of these discussions was the change of a few words and the insertion of language into the corporate governance measures that reaffirmed that the Company has reporting and information systems in place. Finally, all parties executed the Memorandum of Understanding and entered into the Stipulation of Settlement on May 29, 1997.

43. Plaintiffs' Co-Lead Counsel drafted all of the Settlement papers during May 1997. After further discussions and revisions, including revisions to reflect that the Delaware action is to be dismissed upon this Court's approving the Stipulation of Settlement and entering a judgment, Plaintiffs' Co-Lead Counsel fiinalized the Stipulation of Settlement and exhibits.

B. *The Stipulation of Settlement.*

44. The Stipulation of Settlement negotiated by Plaintiffs' Co-Lead Counsel provides that the Board will adopt the following new corporate governance measures and procedures no later than 60 days after this Court's approval of the Settlement and the dismissals of this litigation and the Delaware action become final:

—a new definition of an outside director that will become part of ADM's By-Laws;

—a limit on the number of management directors, other than the Chief Executive Officer, to two ADM employees;

—a Nominating Committee comprised only of outside directors and, for the 1997 Board election, comprised exclusively of outside directors elected to the Board after the events that let [*sic*] to this lawsuit occurred;

—an outside director, either the Chairman if he qualifies or an elected Vice-Chairman, to preside over all meetings of non-management directors and the Governance Committee;

—an Audit Committee comprised only of outside directors and, for three years, comprised of outside directors who were elected to the Board after the events that led to this lawsuit occurred;

—a requirement that the Audit Committee engage outside independent counsel (to be paid from the settlement proceeds) for at least three years to advise it in connection with its oversight and legal compliance responsibilities, including determining whether the Company is violating any antitrust law, promulgating compliance policies and ensuring that employees adhere to these policies;

—a Governance Committee of non-management directors to assess Board and Committee effectiveness and evaluate the Chief Executive Officer;

—payment of at least one-half of director compensation in ADM stock with no increase in total compensation to a director for three years;

—confidential shareholder voting;

—a Public Policy Committee to promote communication between Company executives and investors, analysts, and other appropriate organizations.

45. The Settlement also requires the Director Defendants to pay, or to have paid in their behalf, $8 million (the "Settlement Proceeds") by June 2, 1997. This sum has been deposited in an interest-bearing account at Hickory Point Bank and Trust in Forsooth, Illinois. The Settlement Proceeds are to be used to pay reasonable attorneys' fees and expenses as ordered by the Court and the cost of Notice of the Settlement to current shareholders. The balance of the Settlement Proceeds will be paid to ADM to fund the expenses, costs and legal fees of the Audit Committee, for at least three years, to fulfill its independent review responsibilities, and for any training or educational efforts undertaken at the Audit Committee's direction.

46. The Settlement also provides that the plaintiffs will release defined claims against the Company and the Director Defendants and that the Company will release defined claims against the Director Defendants but will retain claims that it has against Whitacre and others, and that it may have against Michael Andreas and Terrance Wilson.

47. On May 30, 1997, this Court entered an Order preliminarily approving the terms of the Settlement and directing that Notice of the Settlement be provided to all current shareholders of ADM and that a summary notice of the proposed Settlement be pubilshed in *The Wall Street Journal.* Pursuant to this Order, over 243,000 Notices were mailed to ADM shareholders and the summary notice was published on June 13, 1997. The Affidavit of Publication is attached as Exhibit A.

C. *Evaluation Of The Proposed Settlement.*

48. Based on their factual and legal investigation of the claims and defenses in this litigation, the thorough briefing of two motions to dismiss, intense and protracted settlement negotiations, extensive consultation with experts and ADM's institutional investors, and their experience and familiarity with other similar actions, Plaintiffs' Co-Lead Counsel have concluded that the Settlement is fair, reasonable and adequate and in the best interests of ADM and its shareholders. The Settlement provides substantial benefits, a significant portion of which could not have been achieved through litigation, and avoids further, protracted, difficult and costly litigation with a risk of no recovery.

49. In analyzing the advantages and disadvantages of the settlement terms, Plaintiffs' Co-Lead Counsel at all times took into account the views and interests of ADM's shareholders, the benefit to the Corporation of the corporate governance measures, the interest of the Company in avoiding protracted and expensive litigation directed at ADM's past problems, and the risks of the litigation.

50. At the outset, plaintiffs had to overcome defendants' argument that plaintiffs cannot assert derivative claims because they failed to make pre-suit demand or demonstrate that demand was not required. Although plaintiffs believe they have a strong argument that a majority of ADM's Directors lacked the capacity to respond in good faith to a demand because they were interested in the litigation or were dominated by someone who had an interest, the outcome of this motion was not certain.

51. Once plaintiffs overcame this motion, they would face a number of obstacles in attempting to establish defendants' liability for the derivative claims. Defendants have argued that the conduct about which plaintiffs complain provides no basis for derivative liability because defendants acted reasonably and in good faith. Under

ADM's Certificate of Incorporation, directors are not liable for such conduct. Moreover, the claim that defendants failed to prevent wrongdoing by others is acknowledged to be a difficult claim on which to succeed. *In re Caremark International Inc. Derivative Litiga ion,* 1996 Del. Ch. LEXIS 125, 23, No. 13670 (Sept. 25, 1996). In order to prevail, plaintiffs would have to demonstrate intentional, reckless, or at least grossly negligent wrongdoing on the part of the directors. Plaintiffs would have to demonstrate the defendants' sustained or systematic failure to exercise oversight responsibilities. Defendants would contend that they had appropriate information gathering and reporting systems intact and that allegations of wrongdoing resulted from the misconduct of one employee, who was acting out of self-interest and who is not to be trusted.

52. Although ADM has been the subject of a federal criminal investigation and other civil litigation, none of these proceedings established findings or disclosed information that could be used to prove that the defendants in this action, other than Michael Andreas, breached their fiduciary duties to the Company. Plaintiffs also would have had difficulty in obtaining evidence to support their claims because most—if not all—fact witnesses would be defendants or ADM employees or agents.

53. Plaintiffs' Co-Lead Counsel took into account that the Company's director and officer liability insurance was limited and contained exclusions and that the Company could not reasonably expect to recover from the defendants anywhere near the more than $200 million that the antitrust violations had cost it. Therefore, a substantial monetary recovery was unlikely.

54. Based on these factors, Plaintiffs' Co-Lead Counsel have concluded that the Settlement is fair, reasonable and adequate and in the best interests of ADM and its shareholders.

IV. PLAINTIFFS' COUNSEL'S REQUEST FOR ATTORNEYS' FEES AND EXPENSES

55. Plaintiffs' counsel jointly request, as compensation for their substantial efforts and the results achieved, an aggregate fee award of $3,200,000, plus interest from June 2, 1997. Plaintiffs' counsel also seek $76,501.69 for reimbursement of expenses necessarily incurred in the prosecution of this litigation. The entire amount of this fee request is to be paid out of the Settlement Proceeds, the $8 million fund that the Director Defendants created to pay for corporate governance measures and attorneys' fees and expenses. No fees or expenses will be paid from ADM general corporate funds.

56. As noted, ADM's Corporate Governance Committee recommended a number of measures to ADM's Board in early 1996. At the time Plaintiffs' Co-Lead Counsel entered into negotiations with defendants' counsel, however, ADM had not adopted many of these measures. Based on shareholder demands and expert advice, plaintiffs insisted not only that ADM implement these measures, but also that ADM further tighten the qualifications for outside directors, amend its By-Laws to institutionalize the new definition of an outside director, and change the qualifications for membership on key Committees.

57. As part of the Settlement, ADM's Board agreed to adopt the corporate governance measures within 60 days. ADM's Board also agreed to a further restructuring of the Board and Committees that disqualified certain Director Defendants from continuing to serve on the Audit, Nominating and Compensation Committees, created the Corporate Governance Committee, required confidential shareholder voting and required that director compensation be paid partially in stock.

58. Moreover, ADM has agreed that a new Audit Committee, assisted by outside independent counsel to be

funded from Settlement Proceeds, will both (a) determine whether the Company is engaging in anti-competitive activities and (b) promulgate policies and procedures regarding compliance with all laws and the Company's procedures for educating employees and circulating these policies.

59. Plaintiffs' counsel's initiatives and perseverence were a substantial factor in ADM's adoption of the measures set forth in Exhibit A to the Stipulation of Settlement and were responsible for ADM's Board adopting and implementing these measures promptly.

60. Plaintiffs' counsel were aware in the early stages of settlement discussions that they might not be compensated even if they were successful in settling this litigation because of the limited amount of insurance coverage and the exclusion of coverage for antitrust-related litigation. Plaintiffs' counsel, however, did not allow this risk to impede their efforts to resolve this litigation for the benefit of ADM and its shareholders. It was only after Plaintiffs' counsel had spent months negotiating the settlement that they learned that the carrier had agreed to pay $8 million.

61. As set forth in the Miller Declaration, the economic value of this Settlement is $158 million. This value reflects the likelihood that the Settlement will avoid recurrence of the misconduct that led to this litigation, and its costs to ADM, and the effect the corporate governance measures have on ADM's market value. The total long-term economic value of this Settlement to ADM and its shareholders should be considered in determining the appropriate fee award in this case.

62. The notice mailed to ADM shareholders stated that the Company and the Director Defendants agreed not to oppose an application for an award of attorney fees and expenses up to 49% of the Settlement Proceeds. Only three objections to the fee request have been submitted.

63. Our firms, as *de facto* Plaintiffs' Co-Lead Counsel, were actively involved in all aspects of the prosecution of this action, and directed the work performed by the other plaintiffs' counsel after the cases were coordinated. Plaintiffs' counsel performed a wide range of services reflecting the complexity of the underlying facts and the difficult legal issues under Delaware law. The services our two firms performed included:

(a) Initial investigation and legal research concerning the merits of the case prior to filing the initial derivative complaints;

(b) Researching and drafting numerous pleadings, motions and memoranda, including:

(i) Proposed Consolidated and Amended Derivative Complaint;

(ii) Consolidated and Amended Complaint ("Complaint");

(iii) Supplement to Complaint;

(iv) Amendment and Supplement to Complaint;

(v) a memorandum in opposition to defendants' motion to dismiss or stay;

(vi) a memorandum in opposition to defendants second motion to dismiss;

(vii) a memorandum in opposition to defendants' motion for a protective order;

(viii) a Motion to Compel and supporting memoranda.

(c) Reviewing and analyzing ADM's public filings, press releases and documents produced to the government, ADM board minutes, ADM Corporate Governance Committee materials, and corporate governance treatises, articles and reports;

(d) Conferring over the course of the litigation with experts and institutional shareholders;

(e) Preparing for and appearing at all Court hearings in the United States District Courts for the Northern and Central Districts of Illinois;

(f) Conducting legal research and fact analysis;

(g) Preparing settlement proposals based on corporate governance measures and negotiating the Settlement;

(h) Drafting all settlement papers presented to the Court to effecuate the Settlement.

64. The lodestar of the firms which served as plaintiffs' counsel are detailed in the Appendix submitted herewith. The total lodestar of the seven firms is $1,257,320.75. The Appendix contains the sworn affidavits of each firm that served as plaintiffs' counsel, detailing the work they performed and their respective lodestars, based on each firm's current billing rates. Each firm's lodestar was prepared from contemporaneous, daily time records regularly prepared and maintained by that firm in the normal course of business.

65. Plaintiffs' Counsel also seek reimbursement of $76,501.69 in expenses which were necessarily incurred in the prosecution of this action. The expenses of Plaintiffs' Co-Lead Counsel included expert witness and consulting fees for plaintiffs' corporate governance and economics experts and travel expenses for meetings with ADM's institutional investors. These expenses are reflected on our firm's books and records. The expenses of the firms that served as Plaintiffs' counsel are detailed in sworn affidavits contained in the Appendix submitted herewith.

66. As set forth in detail above, plaintiffs' counsel faced tremendous risks in pursuing this litigation. Recovery was not assured. ADM's limited insurance coverage with its antitrust exclusions increased the risk that there

would be no compensation. Moreover, Plaintiffs' counsel have received no compensation during the course of this litigation, their fees being totally contingent and dependent upon a successful result.

67. Plaintiffs' counsel achieved this outstanding Settlement quickly and efficiently, without unnecessary attorney time and expense.

68. Plaintiffs' counsel are requesting attorneys' fees of $3,200,000, plus interest, an amount that is forty percent (40%) of the Settlement Proceeds and less than the Company and the defendants have agreed not to oppose. We respectfully submit that Plaintiffs' counsel's fee request is fair, reasonable and justified and that the Court should grant Plaintiffs' counsel's joint application for an award of attorneys' fees and expenses.

V. OBJECTIONS TO THE SETTLEMENT

69. Two objections to the settlement have been filed, and three individual shareholders have objected—one in a letter to the Court—to an award of fees and expenses to plaintiffs' counsel of 49% of the Settlement Proceeds. The Notice advised shareholders that the Director Defendants and the Company agreed not to oppose applications for fees and expenses that did not exceed 49% of the Settlement Proceeds ($3,920,000).

70. One objection to the Settlement has been made by John J. Gilbert and Martin Glotzer because the Settlement does not require that ADM adopt cumulative voting. These objectors do not explain why cumulative voting should be part of this settlement. In fact, this objection suggests a change that is inconsistent with the Settlement's objective of strengthening Board independence and having directors who will serve in the best interests of all shareholders. This objection should be denied.

71. The second objection to the Settlement has been filed by Charles W. Pauly. Mr. Pauly contends that the

plaintiffs should be required to try their case because, if the claims have merit, the Settlement is inadequate, and if the case is without merit, the case should not be settled. Mr. Pauly not only overlooks the substantial non-monetary benefits from the Settlement, but he also fails to appreciate that plaintiffs would be unlikely to recover large sums of money from the Director Defendants even if they prevailed. He also apparently does not understand that this litigation was brought on behalf of ADM and that ADM is benefitting from the Settlement fund, not contributing to it. This objection should be denied.

72. The three shareholders who object to fees, Mitchell Berns, John P. Chiara, and Peter D. Scott, state that they believe 49% is too high a percentage. All three objectors focus only on the $8 million fund and do not consider that the value of the Settlement is much greater, that ADM is not contributing to the fund but rather will be receiving more than half of it, and that plaintiffs' efforts caused the fund to be created. The Director Defendants and the Company agreed that reasonable attorneys' fees and expenses should be paid from the Settlement Proceeds and that an award of 49% ($3,920,000 plus interest) was acceptable to them. Plaintiffs' counsel are requesting a fee of $3,200,000, plus interest, which represents 40% of the Settlement Proceeds, plus their expenses, which is less than the Director Defendants and the Company agreed not to oppose. In a letter to the Court, Mr. Chiara suggests further that there may be a conflict between plaintiffs and their counsel because the defendants do not object to the fee. In this case, however, there is no conflict because Plaintiffs' counsel's fees are not paid from any recovery that would otherwise go to the individual plaintiffs. Further, the Company is represented by independent counsel, who have reviewed the fairness to ADM of all the terms of the Settlement, including the agreement not to oppose an award of fees and expenses of up to $3,920,000. These objections should be denied.

CONCLUSION

73. Plaintiffs' Counsel believe that the Settlement, which will promptly bring about significant and highly valuable corporate governance reforms for the benefit of ADM and its current and future shareholders, is far more beneficial than continuing to litigate for an uncertain outcome and the possibility of no recovery for ADM. Plaintiffs' Counsel believe that the proposed Settlement is fair, reasonable, and adequate and should be approved, along with plaintiffs' counsel's request for an award of attorneys' fees and expenses.

We jointly declare under penalty of perjury that the foregoing is true and correct and that this Declaration is executed this 30 day of June, 1997.

/s/ Terry Rose Saunders
TERRY ROSE SAUNDERS

/s/ Robert M. Roseman
ROBERT M. ROSEMAN

EXHIBIT A

STATE OF MASSACHUSETTS)
COUNTY OF HAMPDEN) ss:
CITY OF CHICOPEE)

I, MARGARET YERGEAU, being duly sworn, depose and say that I am the Advertising Clerk of the Publisher of *THE WALL STREET JOURNAL*, a daily national newspaper published and of general circulation in the City and County of New York, in the City of Naperville, DuPage County, Illinois, and in the City and County of Dallas, Texas, and that the attached Notice has been regularly published in *THE WALL STREET JOURNAL* for national distribution for ONE (1) insertion(s) on the follofing date(s): JUNE 13, 1997 and that the foregoing statements are true and correct to the best of my knowledge, information and belief.

/s/ Margaret S. Yergeau

[Notary Omitted in Printing]

IN THE UNITED STATES DISTRCT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

AFFIDAVIT OF JOHN C. COFFEE, JR.

John C. Coffee, Jr., being duly sworn, deposes and says:

1. I am the Adolf A. Berle Professor of Law at Columbia Univerity Law School and have taught corporate and securities law for over twenty years (at Columbia and at the law schools of Stanford University, the University of Michigan, the University of Virginia and Georgetown University). Prior to that, I was a practicing corporate lawyer with the firm of Cravath, Swaine & Moore in New York City from 1970 to 1976.

2. As a law professor, one of my principal areas of specialization has been the field of corporate governance. I am a member both of the Legal Advisory Committee to the Board of Directors of the New York Stock Exchange, Inc. and of the Legal Advisory Board of the National Association of Securities Dealers ("NASD"). I served (for over a dozen years) as a Reporter to the American Law Institute for its restatement on corporate fiduciary duties: See A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE: Analysis and Recommedations (1992) (hereinafter, "ALI Principles"). I am also a co-author of Choper, Coffee and Gilson CASES AND MATERIALS ON CORPORATIONS (3rd ed. 1995); Jennings, Marsh & Coffee, CASES AND MATERIALS ON SECURITIES REGULATION (4th ed. 1992), and Klein

and Coffee, BUSINESS ORGANIZATION AND FINANCE: Legal and Economic Principles (5th ed. 1993), all widely used law school casebooks or textbooks that cover the subject matter of corporate governance. Finally, I have also recently served as a member of the SEC's Advisory Committee on the Capital Formation and Regulatory Processes, am a member of the Executive Committee of the Securities Regulation Institute, and write a regular column on corporate and securities law for both the New York Law Jouranl and the Natonal Law Journal. A fuller listing of my activities and writing is set forth on my resume, which is attached hereto as Exhibit A.

3. Another area in which I have specialized and which is applicable to this case is that of "white collar crime", with a special focus on organizational misconduct. In that regard, I have served as a consultant to the United States Sentencing Commission in connection with its formulation of sentencing guidelines for organizational offenders and served as a Reporter to the American Bar Association for its Standards on Sentencing Alternatives and Procedures (which standards covered organizational sentencing).

4. In this action, I have been retained by the plaintiffs' attorneys to appraise the adequacy and significance of the corporate governance provisions set forth in Exhibit A to the Stipulation of Settlement, dated May 29, 1997 (hereinafter, the "Corporate Governance Provisions"). In considering these provisions, I have compared them with (1) the standards set forth in the ALI Principles; (2) the Corporate Directors' Handbook (the "Handbook") prepared by the Business Law Section of the American Bar Association;[1] (3) certain statements of the Council of Institutional Investors, including its Shareholder Bill of Rights and its definition of "independ-

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[1] See Section on Business Law, *Corporate Directors' Handbook*, 49 Bus. Law. 1243 (1994).

ent director;"[2] (4) certain proposed guidelines drafted by Calpers, the nation's largest public pension fund,[3] (5) the guidelines of the National Association of Corporate Directors;[4] and (6) the 1994 General Motors Guidelines on Significant Corporate Governance Issues (hereinafter, the "GM Guidelines").[5] Both the Handbook and the GM Guidelines have been described as "very helpful" by the Chief Justice of the Delaware Supreme Court in determining director independence and "aspirational corporate practices," and he has recommended that they "should be consulted by boards and their advisers."[6]

5. In general, I believe the Corporate Governance Provisions represent more or less the "state of the art" in American corporate governance today. This is not to say that every conceivable reform provision has been adopted, but virtually every reform about whose desirability there today exists a significant consensus among commentators and institutional investors has been incorporated. In addition, beyond these corporate governance provisions, there are special legal compliance provisions that I believe are of special value to a corporation with Archer Daniels Midland's ("ADM") history. In this affidavit, I undertake to review these separate provisions, first individually and then in terms of their aggregate impact.

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[2] This statement is attached hereto as Exhibit B.

[3] See Adam Bryant, "Calpers Draws a Blueprint for Its Concept of An Ideal Board", New York Times, June 17, 1997 at D-1.

[4] See John A. Byrne, "The National Association of Corporate Directors' new guidelines won't tolerate inattentive, passive uninformed board members," Business Week, November 25, 1996 at p. 100.

[5] See General Motors Guidelines, reprinted in Corporate Governance Advisor, May-June, 1994, at 3-4.

[6] See E. Norman Veasey, *The Defining Tension in Corporate Governance in America*, 52 Bus. Law. 393, 399 (1997).

I. *Corporate Governance Provisions*

6. Initially, the Corporate Governance Provisions require that "a majority of the Board shall be comprised of outside directors." (See Section I "Board Structure and Policies"). This is the norm today for publicly traded companies and does not in itself reflect any significant step forward. However, this same section goes on to provide that direct management representation on the board "should be kept to a minimum and should in no event exceed two other management directors." Although this is again in keeping with current practice, this express limitation is relatively rare. The recently released Korn/Ferry's 24th Annual Board of Directors Study finds that the typical public board today has eleven members, only two of whom are insiders.[7] The formal recognition of a principle that the management directors should be limited to a maximum of three has positive value and is thus an advance over current prevailing practice. Because this provision will be incorporated into ADM's bylaws and cannot be repealed without specific disclosure and an SEC filing, there is considerable reason to believe it will be a permanent feature of ADM's future corporate governance.

7. More importantly, the definition of "outside director" in the Corporate Governance Provisions is tighter and more restrictive than those set forth in most of the well-known contemporary corporate governance guidelines. Its definition appears to be modeled after the Council of Institutional Investors' "Definition of an Independent Director" (attached hereto as Exhibit B). I believe this definition is particularly meaningful and relevant to ADM's case because it will effectively preclude the counting of business consultants or advisers to ADM as outside directors.

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[7] See "Cash Compensation Drops for Outside Directors, annual Korn/Ferry Study Reveals," Business Wire, May 7, 1997.

8. The Corporate Governance Provisions also effectively endorse the "lead director" concept. This idea emanates from an important article by Jay Lorsch and Martin Lipton,[7] which recommended the appointment of a "lead director" to oversee the functioning of the board. Effectively, the existence of formally designated lead director creates a safety valve or check within the board on the influence of a dominating CEO, and it does so without requiring the automatic separation of the CEO and Chairman positions (which some feel can compromise the authority of the CEO and result in inefficiency). The GM Guidelines effectively endorsed this principle. Here, the "lead director" will in effect be either the Chairman (if the Chairman is an outside director) or the Vice-Chairman (if not) (See Section IV ("Leadership of the Board").

9. While highly meritorious in my judgment, the "lead director" concept remains controversial. A 1996 survey of board practices finds that 79% of respondents opposed designating a "lead director" for their board.[8] In that light, the Corporate Governance Provisions take an important, but still novel, step toward establishing a board capable of withstanding managerial pressures. The Corporate Governance Provisions cannot thus be criticized for simply adopting a widely prevalent model for corporate governance; rather they impose on the board controls and procedures that are resisted by most corporate executives today and would not be likely to have been adopted, absent the current litigation.

10. Another important innovation is the Governance Committee (See "Section IV Governance Committee").

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[7] See Martin Lipton & Jay W. Lorsch, *A Modest Proposed* [*sic*] *for Improved Corporate Governance* 48 Bus. Law. 59 (1992); see also, Jay W. Lorsch & Martin Lipton, *On the Leading Edge: The Lead Director Concept*, Harv. Bus. Rev., Jan.-Feb., 1993 at 79.

[8] See the IRCC Monitor: Board Practices Survey, Corporate Governance Advisor, May/June 1996 at 25-26.

The critical idea underlying this committee is the need for an at least annual review of the board's performance and that of the Chief Executive Officer (in the latter case the review is to be by all nonmanagement directors). Again this requirement is consistent with the philosophy and approach of the GM Guidelines, and it is to be backstopped and enforced by annual disclosures about "the performance criteria and evaluation process in the Company's proxy statement." Because the idea of an annual board review of the CEO's performance has been widely resisted by corporate executives,[9] its adoption seems unlikely, but for this litigation.

11. Other meaningful changes introduced by the Corporate Governance Provisions include the adoption of confidential voting and the addition of new outside directors to both the Audit and Nominating Committees. As a result of these changes, no member of management will continue on the Nominating Committee under the Corporate Governance Provisions.

12. Collectively, the combination of the lead director provision, the annual board review, and the requirements that (a) the Audit Committee be composed "solely of outside directors" for the next three years (see "Section V. Independent Review Responsibilities of the Audit Committee") and (b) the Nominating Committee for the 1997 board election be composed "of outside directors who were first elected to the Board of Directors after June 25, 1996," represent in my judgment significant steps to facilitate board independence and to end the apparent managerial domination of the ADM board. Although it is never possible to predict that these changes will of necessity be succesful, there is frankly little more than [*sic*] can be done from a corporate governance perspective in terms of board structure or procedures.

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[9] In the same IRRC survey discussed above, 62.9% of respondents disfavored any policy whereby outside directors would hold periodic meetings without the presence of the CEO. *Id.* at 25-26.

II. *Law Compliance*

13. ADM is incorporated in Delaware, and under Delaware corporate law the ADM board of directors owes a duty of care to ADM under which it must supervise and monitor the corporation's performance, including for possible violations of law. See, *In re Caremark International Inc. Derivative Litigation,* 1996 Del. Ch. LEXIS 125 (Del. Ch. Sept. 25, 1996).

14. The Corporate Governance Provisions take important steps in addressing and rectifying any legal compliance deficiencies by expressly assigning to ADM's Audit Committee new oversight responsibilities for law compliance, including issues of antitrust, discrimination, foreign corrupt practices act enforcement, environmental conduct and federal securities laws requirements. This assignment is not simply a general precatory instruction, but rather an order (a) to determine whether ADM is engaged in anti-competitive activities and (b) to promulgate policies and procedures regarding (i) compliance with the law, (ii) ADM's procedures for educating employees about compliance with the law; and (iii) ADM's procedures for circulating these policies. The Audit Committee is further charged with authority to ensure adherence to these policies and procedures. Additional specific instructions require:

(1) the retention of outside independent counsel (for at least a three year period) to advise and assist the Audit Committee;

(2) the appointment to the Audit Committee of only outside directors, and, for three years, only outside directors who were first elected to the board after June 25, 1995.

15. It is important to recognize that, to the extent these requirements introduce new compliance policies and procedures by newly appointed Committee members and

advisers, they will help guard against the significant financial liability that could result from having corporate officers violate the federal criminal and civil laws in the future.[10] Thus, there is a corporate benefit from the installation of these new oversight responsibilities.

CONCLUSION

16. Ultimately, it is impossible to predict that ADM will not violate the law again. No system of safeguards is foolproof; nor can every contingency be anticipated. But the Corporate Governance Provisions do that which can feasibly be done: establish a framework for effective monitoring and facilitate the evolution (which will not necessarily occur overnight) of an active and independent board. Such therapeutics have value (as the United States Sentencing Commission has independently determined). Indeed, so long as the board structure contemplated by the Corporate Governance Provisions is not modified or abridged, I believe that it is a prudent prediction that ADM will soon have an effective and independent board that will engage in active monitoring.

/s/ John C. Coffee, Jr.
JOHN C. COFFEE, JR.

[Notarization dated 25 June 1997 Omitted in Printing]

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[10] In 1991, pursuant to the Sentencing Reform Act of 1994, the United States, Sentencing Commission adopted Organizational Sentencing Guidelines, which greatly enhanced the criminal fines (and other sanctions) for corporate and other organizational defendants in federal court, but also offered a correspondingly substantial credit against these presumptive sentences for organizations that adopted an "effective program to prevent and detect violations of law." See United States Sentencing Commission, Guidelines Manual, Chapter 8, § 8A1.2, Application Note 3(k) (defining such an "effective program"). This affiant was a consultant to the Commission in this process.

EXHIBIT A

RESUME

John Collins Coffee, Jr.
320 Wyoming Avenue
Maplewood, New Jersey 07040

POSITION:

Adolf A. Berle Professor of Law, Columbia University Law School

EDUCATION:

Amherst College 1966 B.A. (*magna cum laude*) Bond Fifteen (highest fifteen ranking seniors); Phi Beta Kappa

LAW SCHOOLS:

Yale Law School 1969, LL.B; New York University Law School, 1976 LL.M (in Taxation).

OCCUPATIONAL HISTORY:

Columbia Law School 1980--present; Berle Chair since 1986

Stanford Law School—Visiting Professor, Spring 1987

Virginia Law School—Visiting Professor, Fall 1979

Michigan Law School—Visiting Professor, Summer 1979

Georgetown University Law School—Professor and Associate Professor, 1976-1980

Cravath, Swaine and Moore—Associate, 1970-1976
Reginald Heber Smith Fellowship, 1969-1970

SPECIALIZATIONS:

My academic teaching specialties include corporate and securities law, class actions and complex litigation, criminal law, and white collar crime.

OTHER ACTIVITIES and HONORS:

1. Fellow, American Academy of Arts and Sciences
2. Reporter (for Litigation Remedies), American Law Institute, PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE (1980-1993: Final Draft 1993)
3. Reporter, American Bar Association, MINIMUM STANDARDS FOR CRIMINAL JUSTICE (2nd ed. 1980)
4. Member, Advisory Committee on Capital Formation and Regulatory
5. Member, Legal Advisory Committee to the Board of Directors, New York Stock Exchange (1992-1995) (currently, emeritus member)
6. Member, Legal Advisory Board, National Association of Securities Dealers (NASD) (1996-)
7. Member, Market Practices Committee, NASD Regulation, Inc. (1997-)
8. Member, Subcouncil on Capital Allocation, United States Competitiveness Policy Council (created by Omnibus Trade and Competitiveness Act of 1988) (1993-1995)
9. Member, Standing Committee on Law and Justice, Commission on Behavioral and Social Sciences and Education, National Research Council (elected to 1990-1994 term)

10. Member, National Academy of Sciences Panel on Research on Sentencing (1979-1982)
11. General Counsel, American Economic Association (1992-)
12. Fellow, American Bar Foundation
13. Member, American Law Institute
14. Chairperson, Section on Business Associations, Association of American Law Schools (AALS) (1981-1982)
15. Chairperson, Audit and Investment Policy Committee, AALS (1992-1994) and former member, Nominating Committee, AALS (1990-1991)
16. Chairperson, Committee on Sections, AALS (1984-1985)
17. Board of Editors, M&A and Corporate Governance Law Reporter
18. Board of Contributing Editors, American Lawyer Newspaper Group
19. Columnist on Corporate and Securities Law, New York Law Journal
20. Businesswatch Columnist, National Law Journal
21. Member, Special Committee on Mergers, Acquisitions and Corporate Control, Contests (1996-), and former member, Committee on Corporate Laws (1994-1995), Committee on Securities Regulation (1991-1994) and Committee on Corporate Laws (1983-1985), Association of the Bar of the City of New York
22. Member, Executive Committee, Securities Regulation Institute (1992-1996)
23. Chairperson, Appointments Committee, Columbia Law School (1987-1990)

24. Frequent Panelist at PLI, ALI-ABA, SEC and other Seminars and Institutes and have testified before Congress.

BOOKS, AND CASEBOOKS

1. Choper, Coffee and Gilson, CASES AND MATERIALS ON CORPORATIONS, (Little Brown & Co.) (4th edition 1985)
2. Jennings, Marsh, and Coffee, CASES AND MATERIALS ON SECURITIES REGULATION (7th ed. 1992)
3. Reporter, ABA MINIMUM STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980) (Chapter 18)
4. Klein and Coffee, BUSINESS ORGANIZATION AND FINANCE (6th ed. 1996)
5. Coffee, Lowenstein and Rose-Ackerman, KNIGHTS RAIDERS AND TARGETS: The Impact of The Hostile Takeover (Oxford University Press, 1988)
6. Tonry and Zimring, REFORM AND PUNISHMENT (Chicago University Press 1984) (one third of this book is an essay by Coffee)

LAW REVIEW ARTICLES: (in reverse chronological order)

1. Coffee, *Transfers of Corporate Control and the Triggering Thesis: Can Delaware Law Encourage Efficient Transactions While Chilling Inefficient Ones?*, 21 Del. J. Corp. L. 359 (1996).
2. ———, *The Future of the Private Securities Litigation Reform Act of 1995: or Why the Fat Lady Has Not Yet Sung*, 51 Bus. Law. 975 (1996).

3. ———, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343 (1995).

4. ———, *Competition versus Consolidation: The Significance of Organizational Structure in Financial and Securities Regulation*, 50 Bus. Law. 447 (1995)

5. ———, *Hail Britannia?: Institutional Investor Behavior Under Limited Regulation*, 92 Mich. L. Rev. 1997 (1994) (with Black)

6. Coffee, *The SEC and the Institutional Investor: A Half-Time Report*, 15 Cardozo Law Review 837 (1994)

7. ———, *New Myths and Old Realities: The American Law Institute Faces the Derivative Action*, 48 Bus. Law. 1407 (1993)

8. ———, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 Yale L.J. 1875 (1992)

9. ———, *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 Colum. L. Rev. 1277 (1991)

10. Coffee and Klein, *Bondholder Coercion: The Problem of Constrained Choice in Debt Tender Offers and Recapitalizations*, 58 U. Chi. L. Rev. 1207 (1991)

11. Coffee, *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. Rev. 193 (1991)

12. ———, *Unstable Coalitions: Corporate Governance as a Multi-Player Game*, 78 Geo. L.J. 1495 (1990)

13. ———, *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 Columbia. L. Rev. 1618 (1989)

14. ———, Hush!: *The Criminal Law Status of Confidential Business Information After McNally and Carpenter and the Enduring Problem of Overcriminalization*, 26 Amer. Crim. L. Rev. 121 (1989)

15. ———, *The Uncertain Case for Takeover Reform: An Essay on Stockholders Stakeholders and Bust-ups*, 1988 Wisc. L. Rev. 435

16. ———, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877 (1987)

17. ———, *Rethinking the Class Action: A Policy Primer on Reform*, 62 Ind. L. Rev. 625 (1987)

18. ———, *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 Michigan L. Rev. 1 (1986)

19. ———, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669 (1986)

20. ———, *The Future of Corporate Federalism*, 8 Cardozo L. Rev. 759 (1987)

21. ———, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 Law and Contemporary Problems 5 (1985)

22. ———, *Partial Justice: Balancing Fairness and Efficiency in Partial Bids*, 3 Companies and Securities Law Review 216 (Australian Law Review).

23. ———, *Litigation and Corporate Governance: An Essay on Steering Between Scylla and Charybdis*, 52 Geo. Wash. L. Rev. 789 (1985)

24. ———, *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 Va. L. Rev. 717 (1984)

25. ———, *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 Colum. L. Rev. 1145 (1984)

26. ———, *Rescuing the Private Attorney General: Why the Model of the Lawyer As Bounty Hunter is Not Working*, 42 Maryland Law Review 215 (1983)

27. Coffee and Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal Legislative Reform*, 81 Colum. L. Rev. 261 (1981)

28. Coffee, *"No Soul To Damn; No Body Kick," An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386 (1981)

29. ———, *"Twisting Slowly In the Wind": A Search for Constitutional Limits on Coercion of the Criminal Defendant*, 1980 Supreme Court Review 211 (1981)

30. *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 62 Va. L. Rev. 1099 (1977)

31. ———, *The Repressed Issues in Sentencing: Accountability, Predictability and Equality in the Era of the Sentencing Commission*, 66 Geo. L.J. 975 (1978)

32. ———, *The Future of Sentencing Reform*, 73 Mich. L. Rev. 1361 (1975)

33. ———, *Making the Punishment Fit the Corporation: The Problems of Finding an Optimal Corporate Criminal Sanction*, 1 N. Ill. L. Rev. 1 (1980)

34. ———, *Privacy versus Parens Patriae*, 57 Cornell L. Review 571 (1972)

ENDOWED LECTURES

Professor Coffee has delivered annual endowed lectures at the American University, the University of Arizona, Cleveland-Marshall Law School, the University of Colorado, Delaware Law School, the Marshall-Wythe Law School of the College of William and Mary, the University of Maryland, and Washington and Lee University, served as a Distinguished Visiting Scholar at the University of Toronto Law School and Osgoode Hall Law School, and taught as a visiting scholar at the University of Tokyo. He has also given numerous faculty workshops at other law schools.

EXHIBIT B

COUNCIL OF
INSTITUTIONAL
INVESTORS

Suite 512 • 1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 822-0800 • Fax (202) 822-0801

COUNCIL OF INSTITUTIONAL INVESTORS

DEFINITION OF INDEPENDENT DIRECTOR

An independent director is someone whose only non-trivial connection to the corporation is that person's directorship.

A director will not generally be considered independent if he or she:

(a) has been employed by the corporation or an affiliate in an executive capacity;

(b) is an employee or owner of a firm that is one of the corporation's or its affiliate's paid advisers or consultants;

(c) is employed by a significant customer or supplier;

(d) has a personal services contract with the corporation or one of its affiliates;

(e) is employed by a foundation or university that receives significant grants or endowments from the corporation or one of its affiliates;

(f) is a relative of an executive of the corporation or one of its affiliates;

(g) is part of an interlocking directorate in which the CEO or other executive officer of the corporation serves on the board of another corporation that employs the director.

EXPLANATORY NOTES

An independent director is someone whose only non-trivial connection to the corporation is that person's directorship.

NOTES: Independent directors do not invariably share a single set of qualities that are not shared by non-independent directors. Consequently, no clear rule can unerringly describe and distinguish independent directors. However, members of the Council of Institutional Investors believe that the promulgation of a narrowly drawn definition of an independent director (coupled with a policy specifying that a majority of board members should meet this standard), is in the corporation's and all shareholders' on-going financial interest because:

—a genuine quality of independence is critical to a properly functioning board,

—certain clearly definable relationships pose a sufficient threat to a director's unqualified independence in a sufficient number of cases that they warrant advance identification,

—the effect created by a conflict of interest on an individual director is almost impossible to detect, either by shareholders or other board members, and,

—while an across-the-board application of *any* definition to a large number of people will inevitably miscategorize a few of them, this is sufficiently small that it is far outweighted by the significant benefits.

Stated most simply, an independent director is a person whose directorship constitutes his or her only connection to the corporation. The definition approved by members of the Council contains this basic formulation. It then adds to it a list of the relationships members believe pose the greatest threat to a director's independence. The existence of any such relationship will remove a director from the independent category. Relationships not described in this list will not be considered in assessing independence.

The following notes are supplied to give added clarity and guidance in interpreting the specified relationship.

(a) has been employed by the corporation or an affiliate in an executive capacity

NOTES: The term "executive capacity" includes the chief executive, operating, financial, legal, and accounting officers of a company. This includes the president, treasurer, secretary, controller, and any vice-president who is in charge of a principal business unit, division, or function (such as sales, administration, or finance) or performs a major policymaking function for the corporation.

An "affiliate" relationship is established if one entity either alone or pursuant to an arrangement with one or more other persons, owns or has the power to vote more than 25 percent of the equity interest in another, unless some other person, either alone or pursuant to an arrangement with one or more other persons, owns or has the power to vote a greater percentage of the equity interest. For these purposes, equal joint venture partners meet the definition of an affiliate, and officers and employees of equal joint venture enterprises are considered affiliated.

Affiliates include predecessor companies. A "predecessor" of the corporation is a corporation that within the last ten years represented more than 80 percent of the corporation's sales or assets when such predecessor became part of the corporation. Recent merger partners are also considered predecessors. A recent merger partner is a corporation that directly or indirectly became part of the corporation or a predecessor within the last ten years and represented more than 50 percent of the corporation's or predecessor's sales or assets at the time of the merger.

A subsidiary is an affiliate if it is at least 80% owned by the corporation and accounts for 25% of the corporation's consolidated sales or assets.

(b) is an employee or owner of a firm that is one of the corporation's or its affiliates paid advisers or consultants;

NOTES: Advisors or consultants include, but are not limited to, law firms, accountants, insurance companies, and banks.

(c) is employed by a significant customer or supplier;

NOTES: A director shall be deemed to be employed by a significant customer or supplier if the director:

—is employed by or has a 5 percent or greater ownership interest in a supplier or customer where the sales to or by the corporation represent more than 1% of the sales of the customer or supplier or for more than 1% of the sales of the corporation,

—is employed by or has a 5 percent or greater ownership interest in one of the corporation's debtors or creditors where the amount owed exceeds 1% of the corporation's or the third party's assets.

Ownership means beneficial or record ownership, not custodial ownership.

(d) has a personal services contract with the corporation or one of its affiliates;

NOTES: The Council members believe that even small personal services contracts, no matter how formulated, can threaten a director's complete independence. This includes any arrangement under which the director borrows or lends money to the corporation at rates better (for the director) than those available to normal customers—even if no other services from the director are specified in connection with this relationship.

(e) is employed by a foundation or university that receives significant grants or endowments from the corporation or one of its affiliates;

NOTES: This relationship includes that of any director who is a salaried executive of a non-profit organization to which the corporation or its affiliate gives more than $100,000 or 1% of total annual donations received (whichever is less), or who is a *direct* beneficiary of *any* donations to such an organization.

(f) is a relative of an executive of the corporation or one of its affiliates;

NOTES: Relatives include spouses, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, aunts, uncles, nieces, nephews, and first cousins. Executives include those serving in an "executive capacity."

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

[Caption Omitted in Printing]

DECLARATION OF R. ALAN MILLER

I, R. Alan Miller, declare as follows:

Qualifications

1. I am President of Philadelphia Investment Banking Company. My resume is attached as Exhibit A hereto to describe my educational background and experience.

2. Philadelphia Investment Banking Company ("PIBC") provides a wide range of corporate finance services to clients. These services include raising capital through private placements of debt and equity financings; financial analysis and advisory services re: public offerings of securities; merger, acquisition and divestiture services; evaluation and economic analysis services; consulting and litigation support; and other financial services.

3. PIBC and its principals perform a considerable amount of work in the areas of evaluation of businesses and securities and the factors involved in such evaluation. These are done on a formal basis for a variety of purposes, as well as continuously on an informal basis in the process of performing our corporate finance functions such as raising capital, assisting in mergers and acquisitions, etc. The factors used in such evaluations and their importance and materiality to the investment community are areas in which I have developed expertise and had substantial experience over the last twenty-four years. Additionally, we have prepared a substantial number of analyses of market impact and damages in connection with numerous shareholder litigations.

4. Also included in Exhibit A is a list of the 23 cases in which I have testified at trial. Many of these matters have involved determinations of values of companies and/or securities based on actual situations and/or hypothetical assumptions, as well as the determination of materiality. More specifically, among the cases in which I have testified are the following:

A. In *U.S. Banknote Securities Litigation,* I testified as an expert witness on behalf of the plaintiff class (U.S.D.C., S. District of NY, J. Cedarbaum). The jury returned a verdict for plaintiffs and found substantial damages; defendants' expert had said there were none.

B. In *Geriatric and Medical Centers Securities Litigation,* I testified as an expert on behalf of the plaintiff class (U.S.D.C., E. District of Pa., J. Fullam). The jury returned a verdict for plaintiffs and found substantial damages; defendants' expert had said there were virtually none.

C. In *O & M Investment Partners v. Windon et al.,* I testified as an expert on behalf of the plaintiff (U.S.D.C., E. District of Pa., Judge Robert F. Kelly). The parties settled shortly thereafter; plaintiffs received a substantial payment.

D. In *Pennsylvania Enterprises Securities Litigation,* I testified as an expert on behalf of the plaintiff regarding issues of materiality. (U.S.D.C. for the E. District of Pa., J. Van Artsdalen). The judge found those items on which I opined to be material.

E. In *Kay Jewelers Securities Litigation,* I testified as an expert on behalf of the plaintiff class (U.S.D.C. for the E. District of Virginia, Alexandria Division). The parties settled shortly thereafter; plaintiffs received a substantial payment.

F. In *McKinley Allsopp, Inc. v. Jetborne International, Inc.,* I testified as an expert on behalf of the

defendant and counterclaimant (U.S.D.C. for the S. District of N.Y., J. Leval). The judge found for the defendant and counterclaimant and cited my testimony as a factor in establishing the proper standard of investment banking performance at issue.

G. In *I.A. Holdings Corporation Dissenter's Appraisal Action,* I testified as an expert on behalf of the dissenting stockholders (Court of Common Pleas, Del. Co., Pa., J. Lawhorne). The judge found for the dissenting stockholders awarding substantially the amount to which I testified.

H. In *GCA Corporation Securities Litigation,* I testified as an expert on behalf of the plaintiff class (U.S.D.C. for the District of Massachusetts, J. Caffrey). The parties settled shortly thereafter; plaintiffs received a substantial payment.

I. In *Baer v. Fidelco Growth Investors,* I testified for the defendants as to the fairness of the proposed exchange of cash, securities and real estate properties in a corporate reorganization. (Court of Common Pleas, Montgomery Co., Pa.). The judge found the exchange to be fair as I had testified.

J. In *Vadakin v. Vadakin,* I testified for the plaintiff as to the value of a privately held business (Ohio State Court, Marietta). The judge found for the plaintiff, awarding the value to which I testified, and requested my assistance in structuring an award.

Introduction and Summary

5. I have been retained by plaintiffs' counsel for the purpose of consulting on corporate governance and economic issues, and providing my expert evaluation and analysis of certain issues related to the terms of the settlement of this litigation, including certain therapeutic resolutions to be passed by Archer Daniels Midland's (ADM) Board of Directors as set forth in Exhibit B hereto. My

opinions are based on my professional experience including that of assisting in negotiating, structuring and evaluating numerous settlements of securities litigation matters.

6. I have reviewed documents, including the following:

- Consolidated and Amended Derivative Complaint, and Amendment and Supplement Thereto.
- Various proposed terms for settlement.
- National Association of Corporate Directors Blue Ribbon Commission on Director Professionalism—Report (summary).
- Council of Institutional Investors—Definitions of Independent Director and accompanying materials.
- Council of Institutional Investors Shareholder Bill of Rights.
- Numerous trade, business press and investment community articles and research and analyses of board structure and companion corporate governance, and effects on company performance and shareholder value.
- ADM daily share price and volume data for a period from before any kowledge of allegations was "in the market", to date.
- Daily and weekly market and industry index price levels for time periods as above.
- Insider trading data.
- ADM Proxy Statements.
- ADM Forms 10-K and Q.
- ADM annual and quarterly shareholder reports and/or press coverage thereof.
- News articles re: ADM.

- Brokerage firm securities analyst reports on ADM.
- Stipulation of Settlement, including Exhibit A thereto.
- Affidavit of John C. Coffee, Jr. (draft).

7. In my opinion, and based on my education, knowledge and experience, the value of the benefits to ADM from the settlement of the subject litigation is a *minimum* of $158 million, and is quite likely considerably larger.

Evaluation of Terms of Settlement

8. To my understanding, the benefits to ADM from the proposed resolution of the derivative litigation include the following:

A. Cash settlement of $8,000,000.

B. Adoption by the Board of Directors of the corporate governance measures and procedures described in Exhibit B hereto, the purpose of which (from an economic viewpoint) is to significantly reduce or eliminate the likelihood of recurrence of the types of action which led to the subject litigation.

C. Ending the very considerable expense, loss exposure and management distraction which would be caused if the litigation continued.

9. Although $8,000,000 in cash is straightforward, the *benefits* of its use are likely to well exceed this amount. That is, at least 51% of the $8,000,000 cash portion of the settlement is to be used to fund the activities of the independent audit committee and its counsel for a period of at least three years. To the extent this activity reduces the likelihood of recurrence of the type of action which led to the litigation, it increases the value of these reform measures substantially, which described below, is worth many multiples of the $8,000,000 cash amount.

10. The benefits of avoiding the costs referred to in paragraph 8B above can be addressed in two ways:

A. avoidance of such costs in the future, and qualification thereof, and

B. the amount, by observation of the effect on the market value of the Company, of the positive impact of such avoidance on the Company.

11. Attached as Exhibit C hereto is a copy of the "litigation" section of ADM's 1996 Form 10-K Report, which summarizes the outstanding litigation at the date thereof. As a reader can see, the list is long and substantial. I have seen no public discussion of estimated costs or exposure as a result of these matters. However, I believe at least $190 million has been publicly identified so far as amounts paid in fines and settlement payments; that amount does not include legal fees. It appears that $250 million may be a *very* conservative estimate of the direct costs of management's improper actions. To that must be added legal expenses, and the substantial distraction of management attention caused by defending and dealing with these matters. It appears that a *minimum* of $300 million would be the minimum cost of this item.

12. A. To derive an economic value from avoiding a recurrence of these actions and their costs, a percentage probability must be assigned to the likelihood of their recurrence, with and without the board reforms. This is a commonly accepted economic analysis technique known as expected value analysis, or as rational expectations analysis.[1]

[1] This technique is a basic economic tool often used to measure the value of events with multiple possible outcomes. To apply it, one must determine the cost of an event if it does occur, then assign a (percentage) factor to indicate its likelihood of occurrence. If (as in this case) there are two different likelihoods of occurrence given two different sets of assumptions (before and after implementation of the Corporate Governance Provisions), one can measure the difference between them as the cost of the event

Considering the numerous areas of business and number of product lines in which they occurred, the senior level of the management personnel involved (and their ties to those who dominated the board) and the degree of planning and execution necessary to implement the actions, it is difficult to believe the actions would not likely continue absent the Board of Directors reforms. With the reforms in place *and funded* to ensure the independence of overseers, recurrence seems highly unlikely and difficult to achieve. A fair estimate of the difference between likelihood of recurrence and not, is 50% in my opinion; that is 70 to 80% chance of recurrence without reforms versus 20 to 30% with reforms. An observer can make his own judgment as to percentage likelihood, but 20 to 30% seems very conservative (high). To quantify the economic value, then, using the expected value methodology, multiply the cost of recurrence ($300 million minimum) times the differential in likelihood due to reforms (50%) for a result of $150 million *minimum*.

B. In determining the proper percentage likelihood of recurrence of the wrongdoing, I note the following from Professor Coffee's Affidavit:

> In general, I believe the Corporate Governance Provisions represent more or less the "state of the art" in American corporate governance today. . . . In addition, beyond these corporate governance provisions, there are special legal compliance provisions

it if does occur, multiplied times the difference between the likelihood factors. This expected value analysis technique is taught in basic economic courses. It is used constantly by participants in the financial markets, both explicitly and implicitly, as a regular part of quantifying the likely effect on companies or entities of various possible future events, and as a means of reducing risks of various events occurring to dollar values. I have used this technique as the basis for determining alternative values as a basis for damages in numerous litigation matters, including in testimony which became the basis for awards by fact finders.

> that I believe are of special value to a corporation with Archer Daniels Midland's ("ADM") history.
>
> More importantly, the definition of "outside director" in the Corporate Governance Provisions is tighter and more restrictive than those set forth in most of the well-known contemporary corporate governance guidelines.

In addition, he supports the creation of the "lead director" role and its value to the enterprise. Further:

> Collectively, the combination of the lead director provision, the annual board review, and the requirements that (a) the Audit Committee be composed "solely of outside directors" for the next three years . . . represent in my judgment significant steps to facilitate board independence and to end the apparent managerial domination of the ADM board. Although it is never possible to predict that these changes will of necessity be successful, there is frankly little more that can be done from a corporate governance perspective in terms of board structure or procedures.

C. Adding to the benefits of the preventive actions and enhancing their value is the speed with which the improvements in corporate governance are being implemented. The provisions of Exhibit A to the Stipulation of Settlement are to be implemented within 60 days. A review of literature suggests this is considerably faster and further reaching than many corporate governance improvements. See Exhibit E.

13. A. I have reviewed the stock price and volume data for Archer Daniels Midland ("ADM") since July of 1994 as well as news releases and articles during that time to determine the likely impact on overall market capitalization of implementing the Board of Directors reforms in the settlement at issue. The likely market effect of this action is not entirely clear from the analysis as a) financial results or other information was often reported

on or about the same dates as such news as the announcements of the recommendations of the corporate governance committee and may have overshadowed them and b) even though some recommendations for improvement were made (for example in early 1996), the full board initially did not adopt them and in fact appeared to resist them. However, despite these factors, I believe a significant market value impact can be observed. Based on this empirical data, the magnitude of the proposed change could well impact the share price in a range from 0 to as much as $2.00 per share. An effect of .50 to 1.00 is highly likely, with a midpoint of $0.75. Based on the 533,418,000 shares outstanding at May 30, 1997, the effect on total market capitalization would be as follows::

Amount Per Share	*Total Market Capitalization Effect*
$0.25	$ 133,354,500
0.50	266,709,000
0.75	400,063,500
1.00	533,418,000
1.50	800,127,000
2.00	1,066,836,000

To place these figures in context, on May 30, 1997 the stock price was $20.00; the total market capitalization was $10,668,360,000. Using a $0.75 figure from the table above, the aggregate market impact of $400,063,500 =3.75% of $10,668,360,000. In surveys of management quality as perceived by market participants and competitors, ADM has ranked among the worst perceived. The investment community places significant value on management, rewarding companies with high quality management with premium evaluations and applying discounts to those perceived as poor. A 3.75% change in market value is certainly within these parameters.

B. i. I performed a search of academic literature, and trade and business press and investment community publi-

cations, to attempt to determine if there was published information bearing on the value of improving corporate governance and/or providing a framework with which to compare the ADM settlement provisions.

ii. Enclosed as Exhibit D is a copy of an article which appeared in *The Journal of Finance*, Vol. LI, No. 1, March 1996, entitled "Shareholder Activism by Institutional Investors: Evidence from CalPERS" by Michael P. Smith. I believe the article is instructive in that it measures shareholder wealth effects of improved corporate governance structures and procedures, and concludes that "Shareholder wealth increases for firms that adopt [improved corporate governance] or settle and decreases for firms that resist" (from the Abstract). The article concludes "Overall, the evidence indicates that shareholder activism is largely successful in changing governance structure and, when successful, results in a statistically significant increase in shareholder wealth."

iii. Enclosed as Exhibit E are copies of four articles which describe in considerable detail the benefits of improved corporate governance and the actions of various organizations of investors, and of academics to study and promote such improvements, as well as significant information allowing a comparison of the ADM settlement provisions with actual practices at leading companies and generally acknowledged "best practices". The articles cite the following notable studies and reports:

- The General Motors study and report, which has become a blueprint for numerous other companies' policies.
- The Calpers study and review process which graded boards on various measures of effective, independent governance structures and proocesses.
- A study of the Investor Responsibility Research Centre of guidelines developed by boards at S&P 500 companies.

- A book by Ralph Ward, editor of the *Corporate Board* journal, entitled *The 21st Century Corporate Board*, which describes, *inter alia*, how the General Motors guidelines fall short in several areas:

  > Despite some solid reforms, many of the governance tools to be used were carefully left blank. Items such as the committee structure, board size, mix of inside and outside directors, and former chief executive board membership waffled with "as the board may consider appropriate" qualifiers.

  Clearly the ADM settlement provisions are significantly better than these guidelines.
- The National Council of Individual Investors survey ranking companies by their level of "shareholder accountability".
- A study by two Canadian academics in connection with a 1997 scheduled review of the Canada Business Corporations Act.
- A study by *Chief Executive* of best and worst boards including extensive discussion of criteria and results.

A review of these articles confirms that the ADM provisions to be enacted will move it from among the worst (as specifically cited many times), to the head of the best current practices group. Items which are "suggested" or "as deemed appropriate" by other guidelines are *required* in the ADM provisions. Structures are set in writing, and the independent audit committee—charged with monitoring, oversight and training and funded independently—appears unique based on this review.

These observations strongly support my opinions as to the relative percentage likelihood of recurrence of the vio-

lations, and the value of the ADM therapeutic settlement provisions.

14. I have not attempted to place a specific dollar figure on management's time and attention devoted to the defense and administration of this matter but note that in Section III of the Stipulation of Settlement, Defendants state:

> Despite their assertions, the Director Defendants have concluded that the further conduct of the Litigation would be protracted and expensive, and that it is desirable that the Litigation be fully and finally settled in the manner and upon the terms and conditions set forth in this Stipulation in order to limit further expense, inconvenience and distraction, to dispose of burdensome and protracted litigation, and to permit the operation of ADM's business without further expensive litigation and the distraction and diversion of ADM's executive personnel with respect to matters in issue in the Litigation.
>
> Moreover, the Director Defendants recognize that the procedures and measures that are set forth in Exhibit A, and which the Company will implement as part of the Settlement, will provide substantial benefits and protections to the Company and its shareholders.

15. I declare under penalty of perjury, pursuant to 28 U.S.C. Section 1746, that the foregoing statements are true and correct.

/s/ R. Alan Miller
R. ALAN MILLER
President
Philadelphia Investment
Banking Company

Date 6/26/97

[Exhibits Omitted in Printing]

[Filed Jul. 2, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

[Caption Omitted in Printing]

MEMORANDUM OF LAW
IN SUPPORT OF SETTLEMENT

NOW COMES the Nominal Defendant, ARCHER DANIELS MIDLAND COMPANY, a Delaware corporation, by KEHART, SHAFTER & WEBBER, P.C. and WILLIAMS & CONNOLLY, its attorneys, and in support of the settlement proposed herein, respectfully submits the following Memorandum of Law.

STATEMENT OF FACTS

A. BACKGROUND.

The present litigation arose[1] immediately following the public disclosure that the United States Department of Justice was investigating alleged violations of federal antitrust laws[2] by Archer Daniels Midland Company, a Delaware corporation ("ADM"). Generally, the Plaintiffs alleged (within their original as well as subsequent

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[1] The litigation was filed initially in the United States District Court for the Northern District of Illinois as Cause No. 95-4006, and was transferred to the United States District Court for the Central District of Illinois by the Honorable Ruben Castillo, United States District Judge, by order dated October 31, 1995.

[2] The investigation by the United States Department of Justice included markets for three products—lysine, citric acid, and high fructose corn syrup.

pleading(s)) that the Defendants [3] breached fiduciary duties owed to ADM (*see* d/e 28, ¶ 26), but the Plaintiffs concede that

> [e]ach of the Director Defendants has denied and continues to deny each and all of the claims and contentions alleged by the Plaintiffs. . . .

(d/e 60, Ex. A, p. 5).

This litigation purportedly was brought by the Plaintiffs, in a derivative capacity as shareholders, for the benefit of ADM. (*See* d/e 28, ¶ 13). Similar litigation was also advanced in the Court of Chancery for the State of Delaware, entitled *In Re Archer Daniels Midland Company Derivative Litigation*, Consolidated No. 14403. The settlement proposal presently before the United States District Court for the Central District of Illinois (the "District Court") would resolve all shareholder derivative litigation involving ADM and based upon action or inaction which formed (or could have formed) the basis of the present litigation.

B. PROCEDURAL HISTORY.

The present litigation opened in the District Court on September 22, 1995 (d/e 1).[4] On December 27, 1995, the Defendants and ADM moved to dismiss the Plaintiffs' pleading (d/e 2), a motion which was granted on April 26, 1996. The Plaintiffs filed an amended pleading on May 17, 1996 (d/e 28), which pleading also was met with a motion to dismiss, filed June 7, 1996 (d/e 29).

[3] The Defendants are: Dwayne O. Andreas, Ralph Bruce, John H. Daniels, Howard G. Buffett, Lowell W. Andreas, James R. Randall, Michael D. Andreas, H. D. Hale, O. Glenn Webb, Martin Andreas, Margaretta Rockefeller, F. Ross Johnson, Ray A. Goldberg, John K. Vanier, Shreve H. Archer, Jr., M. Brian Mulroney, and Robert S. Strauss.

[4] *Cf.* fn. 1.

Although the Plaintiffs sought leave to supplement their pleading (*see* d/e 43, 49), the pleading on file remains subject to a motion to dismiss by the Defendants and ADM.

On May 30, 1997, the parties submitted an agreed motion requesting preliminary approval of a proposed settlement in order to provide notice to shareholders of ADM (*see* d/e 60). The District Court, by the Honorable Harold A. Baker, then granted the agreed motion and scheduled the matter for hearing on July 7, 1997 to determine whether the proposed settlement is fair, reasonable, and adequate (*see* d/e 62).

C. SETTLEMENT.

1. Introduction.

Following extensive communications, discussions, meetings, and negotiations, the parties entered into a Memorandum of Understanding, dated May 29, 1997, the terms of which constitute the nucleus of the Stipulation of Settlement (the "Stipulation") filed with the District Court on May 30, 1997 (d/e 60).

The proposed settlement provides that the Defendants [5] would be "fully, finally and forever released, relinquished and discharged [from] all Settled Claims." [6] (d/e 60,

[5] The release does not apply to all of the Defendants, and ADM would retain claims, if any, against one Defendant, a former director.

[6] "Settled Claims" is defined as in the Stipulation and the Memorandum of Understanding as any and all causes of action, suits, demands, claims, matters and issues, whether known or unknown, which have been, could have been, or in the future might be asserted, advanced or alleged in any of the Actions (as defined herein) or in any court or arbitration proceeding (including, without limitation, any claims, actions or demands arising under any federal or state law relating to alleged fraud, breach of any duty, negligence, recklessness, violations of federal or state securities laws,

p. 18). In exchange for this release of claims, Eight Million Dollars ($8,000,000.00) would be provided to ADM less fees and expenses approved by the District Court, and ADM would implement certain corporate governance changes.

2. Settlement Funds.

On May 30, 1997, ADM received Eight Million Dollars ($8,000,000.00), paid to ADM by the Defendants or on their behalf. These funds are subject to conditions and restrictions, as described within the Stipulation, but are invested and presently earning interest which also will be paid to ADM upon final approval.[7] These settlement funds are (and will be) invested in securities either issued or collateralized by the United States.

From this $8 Million (plus interest), the attorneys representing the Plaintiffs, and counsel representing shareholders in other derivative litigation, will request compensation, subject to approval by the District Court.

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violations of federal or state antitrust laws or otherwise) by or on behalf of the Company (as defined herein), by any shareholder of said Company derivatively on its behalf, or by any named plaintiff in the Actions (as defined herein) on their own behalf or on behalf of any record or beneficial holder of the stock of the Company (as defined herein), whether individual, class, derivative, representative, legal, equitable, or any other type in any other capacity, which claims have arisen, could have arisen, arise now or hereafter arise out of, or relate in any manner to the allegations, transactions, matters or occurrences, representations, acts or omissions, or any series thereof, involved, set forth, referred to, or related to any of the pleadings in the Actions (as defined herein) against the Company (as defined herein) and/or any of the Individual Defendants (as defined herein), provided, however, that Settled Claims shall not include any claims which the Company may have against Andreas (as defined herein), Wilson (as defined herein), or the Excluded Persons (as defined herein), which claims shall be reserved to the Company in its sole discretion.

[7] As of July 7, 1997, the settlement proceeds should equal $8,039,600.00.

The remaining funds[8] will be utilized in support of the Audit Committee of the Board of Directors of ADM in the performance of its duties to ensure training or educational efforts and implementation of corporate governance changes.

3. Corporate Governance.

If approved, the settlement includes changes in corporate governance as discussed within the agreed motion filed herein on May 30, 1997 (d/e 60).

First, if the Chairman of the Board is not an "outside director" (the definition of which is discussed later herein), then the outside directors will elect an outside director to act as Vice-Chairman to preside over meetings of non-management directors and of the Governance Committee. Second, the Audit Committee, comprised *solely* of outside directors, will be charged with the task of overseeing issues of legal compliance with state or federal laws relating to antitrust, discrimination, environmental, securities and disclosure, and foreign corrupt practices act enforcement. The Audit Committee also will be charged to ensure that reporting systems provide the Board with adequate and accurate information. The Audit Committee will receive regular reports from senior management and likewise will report regularly to the Board as a whole. Outside independent legal counsel will be retained (and selected) by the Audit Committee.

Third, the Governance Committee will establish and approve performance criteria for evaluation of the Chief Executive Officer, assess effectiveness of the Board (and committees), and the Governance Committee's performance criteria and evaluation process will be disclosed in proxy statements for the annual meeting of shareholders.

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[8] Certain of the funds may be utilized to pay costs and expenses necessarily incurred in providing notices or information to shareholders by ADM.

Fourth, total compensation to be paid to non-employee directors (for a period of three (3) years) will not exceed $100,000 per annum, and one-half of this compensation will be paid in ADM stock. Fifth, to the extent permissible, voting by shareholders will be confidential.

Sixth, the Compensation Committee and Nominating Committee, as well as the Audit Committee, will be comprised exclusively of outside directors.

Seventh, a majority of the Board will be comprised of outside directors, and the number of direct management representation on the Board is limited to two individuals plus the Chief Executive Officer. Furthermore, the term "outside director"[9] was defined to mean a director who (a) is neither a current employee nor former member of senior management of ADM or an affiliate; (b) does not have a business or professional relationship which is material to ADM or the director; (c) does not have a close familial relationship with any member of senior management of ADM; (d) is not an officer of a company of which ADM's Chairman or CEO is also a board member; (e) is not personally receiving compensation from ADM in any capacity other than as a director; and (f) does not personally receive, nor is he an employee of a foundation, university or foundation which receives, grants or endowments from ADM which are material to ADM or the recipient.

D. OBJECTIONS.

As of June 30, 1996, the number of shareholders of ADM's common stock, as recorded on the books of ADM, was 35,431. In accordance with the District Court's order

[9] On June 17, 1997, the *Wall Street Journal* reported that the California Public Employees' Retirement System (Calpers), a leading advocate of corporate governance standards (and stringent definitions of "independence"), was unable to establish for itself a set of corporate governance standards.

of May 30, 1997, ADM sent approximately 243,000 notices,[10] for delivery to persons with interests in ADM's stock. These notices advised the recipient (i) of the litigation, (ii) of the proposed settlement of the litigation, (iii) of the terms of the proposed settlement, and (iv) of the right, and manner in which, to present any objection. As of June 30, 1997,[11] ADM is aware of the existence of objections presented by seven (7) shareholders, either individually or jointly.

In alphabetical order of the objectors, objections were received from the following:

(a) Berns, Mitchell—objecting to potential attorneys' fee award;

(b) Chiara, John P.—objecting to potential attorneys' fee award;

(c) Gilbert, John J. and Glotzer, Martin—objecting because governance matters do not require cumulative voting;

(d) Pauly, Charles W. and Elizabeth D.—objecting because settlement award and benefit is too little or too great; and

(e) Scott, Peter D.—objecting to potential attorneys' fee award.

ADM takes no position as to the objections of Messrs. Berns, Chiara and Scott. However, the objections of Messrs. Gilbert and Glotzer and the objections of Mr. and Mrs. Pauly are discussed by ADM herein.

[10] The number of notices greatly exceed the number of shareholders designated on the books of ADM because numerous shareholders hold shares for the benefit of others, often in street names, or in the name of a broker or financial advisor.

[11] Because this memorandum is submitted prior to the date by which objections may be submitted, ADM will seek to supplement this memorandum to dismiss later filed objections, if any.

ARGUMENT

A. THE STANDARDS APPLICABLE TO THE DISTRICT COURT'S REVIEW.

The present litigation is a shareholders derivative action, purportedly brought on behalf of ADM, pursuant to *Fed. R. Civ. P.* 23.1. The motion presently before the District Court is brought because of the directive of *Fed. R. Civ. P.* 23.1 that

> [t]he action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

While the proponents of the settlement must demonstrate that the settlement is fair, adequate and reasonable (*United Founders Life Insurance Co. v. Consumers National Life Insurance Co.*, 447 F.2d 647 (7th Cir. 1971); *Susquehanna Corp. v. Korholz*, 84 F.R.D. 316 (N.D. Ill. 1979)), settlement of shareholders derivative actions are favored and a presumption in favor of approving settlements exists. *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir. 1985). Whether the proposed settlement is fair rests in the sound discretion of the District Court. *See Susquehanna Corp., supra.* The District Court should not, however, decide the merits of the action and should not substitute its judgment for the business judgment of the parties who reached the accord. *See Id.*

In its evaluation of the proposed settlement, the District must

> weigh the probabilities and possibilities of victory or defeat as indicated by the legal or factual situation presented and determine whether the compromise, taken as a whole, is in the best interests of the corporation and its shareholders.

United Founders Life Insurance Co., 447 F.2d at 655, *quoting Winkelman v. General Motors Corp.*, 48 F.Supp. 490, 493 (S.D.N.Y. 1942). The District Court also should consider the following factors: (i) the strength of the plaintiffs' case on the merits; (ii) the complexity, length and expense of continued litigation; (iii) the degree of opposition to the settlement; (iv) the presence of collusion in gaining a settlement; (v) the opinion of competent counsel as to the reasonableness of the settlement; and (vi) the stage of the proceedings and the amount of discovery completed. *Donovan v. Fitzsimmons*, 778 F.2d 298 (7th Cir. 1985); *Susquehanna Corp. v. Korholz*, 84 F.R.D. 316 (N.D. Ill. 1979). As the *Susquehanna Corp.* court observed,

> [w]hen, in a derivative action, a settlement proposal is arrived at after arms-length negotiations have been conducted, it is clear that sufficient discovery has been taken to allow the court and the parties to act intelligently, the counsel involved are competent and experienced, and the numbers of objectors, or the interest they represent, is not large, it may properly be presumed that the agreement is fair and adequate.

84 F.R.D. at 321.

The District Court is not to use the settlement hearing as a trial or a rehearsal of a trial on the merits of the litigation. *Levin v. Mississippi River Corp.*, 59 F.R.D. 353 (S.D.N.Y. 1973), *citing Newman v. Stein*, 464 F.2d 689 (2nd Cir.), *cert. denied* 409 U.S. 1039 (1972); *Glicken v. Bradford*, 35 F.R.D. 144 (S.D.N.Y. 1964). Indeed, an evidentiary hearing, while certainly permitted, is not required. Rather, it is sufficient for the District Court to accept memoranda in support of the settlement and to assure itself that there is an adequate record for evaluating the settlement. *Patterson v. Stovall*, 528 F.2d 108 (7th Cir. 1976).

The present litigation is controlled by the law of the State of Delaware, because ADM is incorporated in Dela-

ware, and the law of the state of incorporation is controlling with respect to the fiduciary duties owed by directors to the corporation. *See Treco, Inc. v. Land of Lincoln Savings & Loan,* 749 F.2d 374 (7th Cir. 1984). In Delaware, the business and affairs of a corporation are managed by or under the direction of the Board of Directors, and such directors are charged with fiduciary obligations, including the duty of loyalty and the duty of care. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del. 1993); 8 Del. C. § 141(a). While directors are charged with fiduciary obligations, such directors fulfill those duties when they exercise business judgment, in good faith, in making decisions concerning the corporate entity. When a director acts in good faith, the director enjoys a presumption of sound business judgment that a court will not disturb so long as a rational business purpose may be attributed to the director's decision.

> In the absence of fraud, bad faith, gross overreaching or abuse of discretion, courts will not interfere with the exercise of business judgment by corporate directors.

Panter v. Marshall Field & Co., 646 F.2d 271, 293 (7th Cir. 1981) (applying Delaware law); *Cf. Cede & Co.*, 634 A.2d 345, *supra*. In the present litigation, the Defendants are also shielded by Article XIV of the ADM Certificate of Incorporation, permitted by Delaware law, and which includes a provision:

> A director of the Corporation shall have no personal liability to the corporation or its stockholders for monetary damages for breach of his fiduciary duty as a director, provided however this Article shall not eliminate or limit the liability of a director (1) for any breach of director's duty of loyalty to the Corporation or its stockholders; (2) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (3) for the unlawful payment of dividends or unlawful stock repurchases under § 174 of the General Corporation Law of the State of Delaware; or (4) for any transaction from which the director derived an improper personal benefit. This Article shall not eliminate or limit the liability of a director for any act or omission occurring prior to the effective date of this Article.

Thus, the Certificate of Incorporation of ADM provides a further hurdle for the Plaintiffs to overcome in any successful litigation against the Defendants for breach of fiduciary obligations.

B. THE PRESENT LITIGATION IS SUBJECT TO INVOLUNTARY DISMISSAL UNDER DELAWARE LAW.

Shareholder derivative litigation brings to the court a cause of action which properly belongs to the corporation (*Rales v. Blasband,* 634 A.2d 927 (Del. 1993)), and because the litigation is brought purportedly on behalf of the corporation, any damages recovered are paid to the corporation. *See Sternberg v. O'Neil,* 550 A.2d 1105 (Del. 1988); *Zapata Corporation v. Maldonado,* 430 A.2d 779 (Del. 1981). Furthermore, the directors, not the shareholders, manage the business and affairs of the corporation. *Aronson v. Lewis,* 473 A.2d 805 (Del. 1984).

Arising from the principle, that derivative litigation belongs to the corporation, is the requirement that the shareholders make demand upon the Board prior to filing shareholder litigation. *See Spiegel v. Buntrock,* 571 A.2d 767 (Del. 1990). This requirement of a pre-suit demand is designed

> to assure that the stockholder affords the corporation the opportunity to address an alleged wrong without litigation, to decide whether to invest the resources of the corporation in litigation, and to control any litigation which does occur.

Id, 571 A.2d at 773. In *Aronson v. Lewis*, 473 A.2d, 805 (Del. 1984), the Supreme Court of Delaware stated

> By its very nature the derivative action impinges on the managerial freedom of directors. Hence, the demand requirement. . . exists at the threshold, first to insure that a stockholder exhausts is [*sic*] intracorporate remedies, and then to provide a safeguard against strike suits. Thus, by promoting this form of alternate dispute resolution, rather than immediate recourse to litigation, the demand requirement is a recognition of the fundamental precept that directors manage the business and affairs of corporations.

473 A.2d at 811-12 (footnote omitted).

The requirement of making a pre-suit demand is strictly enforced by the courts. Where a putative derivative plaintiff seeks to institute an action on a corporation's behalf without demand on the Board, the plaintiff must allege, *with particularity*, specific *facts* demonstrating why such demand should be excused. *See Fed. R. Civ.* 23.1; Del. Ch. Rule 23.1; *Stepak v. Dean*, 434 A.2d 388, 390 (Del. Ch. 1981). The failure to make a demand or to plead legally sufficient facts demonstrating that demand should be excused mandates dismissal of the complaint. *Pogostin v. Rice*, 480 A.2d 619 (Del. 1984); *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984).

In the present litigation, the Plaintiffs did not make a pre-suit demand, and it is the position of ADM that the Plaintiffs failed to meet their heavy burden in pleading specific facts which would demonstrate that a majority of the Board was either (1) so self-interested in the challenged conduct or (2) so dominated and controlled by the alleged corporate wrongdoer(s) to reverse the customary presumption of independence. *See Levine v. Smith*, 591 A.2d 194 (Del. 1991); *Pogostin v. Rice*, 480 A.2d 619 (Del. 1984).

As is set forth within ADM's motion to dismiss the complaint (d/e 29) and as is explained within ADM's

memorandum in support of that motion (d/e 31), the Plaintiffs face a substantial burden in attempting to overcome ADM's motion to dismiss the litigation in its entirety for failure to make the requisite demand upon the Board of Directors, and the Plaintiffs' failure to plead particularized facts sufficient to excuse this demand. Furthermore, the Certificate of Incorporation of ADM includes a substantial shield for the Defendants from liability for monetary damages allegedly arising from breaches of the duty of care. Thus, the present litigation is similar to shareholder derivative actions in general as being "notoriously difficult and unpredictable." *Schimmel v. Goldman*, 57 F.R.D. 481, 487 (S.D.N.Y. 1973); *Cf. Zimmerman v. Bell*, 800 F.2d 386 (4th Cir. 1986); *Maher v. Zapata Corp.* 714 F.2d 436 (5th Cir. 1983); *Republic National Life Insurance Co. v. Beasley*, 73 F.R.D. 658 (S.D.N.Y. 1977).

C. THE PROPOSED SETTLEMENT IS IN THE BEST INTEREST OF ADM AND ITS SHAREHOLDERS.

The proposed settlement presently before the District Court for approval involves various elements. That portion of the proposed settlement which involves payment of $8 Million by the Defendants, or on their behalf, and that aspect which provides that certain claims are reserved to ADM, are straightforward. Those elements of the proposed settlement involving issues of corporate governance are, in reality, the linchpin of the proposed settlement. Such "corporate therapeutics" for the benefit of the corporation may, by themselves, support a derivative settlement. *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1034 (3rd Cir. 1993); *Granada Investment, Inc. v. DWG Corp.*, 962 F.2d 1203 (6th Cir. 1992); *Zimmerman v. Bell*, 800 F.2d 386 (4th Cir. 1986); *Maher v. Zapata Corp.* 714 F.2d 436 (5th Cir. 1983); *Levin v. Mississippi River Corp.*, 59 F.R.D. 353 (S.D.N.Y.), *affirmed* 486 F.2d 1398 (2nd Cir.), *cert. denied*, 414 U.S. 1112

(1973); and *Cf. Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) (non-monetary recovery on merits does not preclude award of fees). The corporate therapeutics involved in the presently proposed settlement are set forth clearly within the Stipulation of Settlement (d/e 60), and need not be repeated here. Suffice to say that these corporate therapeutics include substantial changes in the manner in which issues are presented and resolved by the ADM Board. ADM presents in support of its position on this issue the Affidavit of Professor Michael P. Dooley, the William S. Potter Professor of Law at the University of Virginia.

In *Bell Atlantic Corp.*, the court assessed whether a settlement which mandated structural changes in the corporate governance of the corporation was a fair settlement of a shareholder derivative action. The court noted the difficulty in measuring the value in the non-monetary benefit, and an objector to the settlement charged that these corporate governance changes were duplicative of changes already made and that the change upon which the settlement was premised amounted to little more than a promise to obey the law. The United States Court of Appeals for the Third Circuit rejected these objections and held that the changes in corporate governance brought about by the settlement were broader and more inclusive than changes to which the company had agreed in an action with the State Attorney General, and the court noted that the agreement not only ensured that the corporation would follow the law, but provided specific mechanisms to ensure employees of the corporation and its subsidiaries behaved appropriately. *See Bell Atlantic Corporation*, 2 F.3d at 1312. The *Bell Atlantic Corp.* court also noted the improbability of the plaintiff's success on the merits and the fact that fewer than thirty (30) of the corporate entity's 1.1 million shareholders objected to the proposed settlement.

In *Zimmerman*, a shareholder derivative action arising out of the alleged mishandling of a takeover attempt, the

court considered a settlement which required the corporation to adopt a detailed statement of procedures to be followed in the event of a future tender offer or takeover bid. Two out of "tens of thousands" of shareholders objected to the proposed settlement. The *Zimmerman* court noted

> Influencing the future conduct of management may serve the interests of the corporation as fully as a recovery for past misconduct, and a settlement may be accepted "even though no direct monetary benefits are paid by the defendants to the corporation." Here, the Statement of Policy provides guidelines for future management responses to tender offers and takeover bids, the very situation that prompted these various complaints.

800 F.2d at 390, *quoting Maher v. Zapata Corp.*, 714 F.2d 436, 466 (5th Cir. 1983). The *Zimmerman* court noted that the majority of directors were outside directors, that the Board obtained outside advice from an investment banker, and that settlement of shareholder derivative actions are favored because of the complexity of the litigation, and the Court of Appeals held that the district court did not abuse its discretion in approving the settlement.

In *Granada Investments*, a minority shareholder brought a derivative action against a corporation and its directors, which included controlling shareholders. The *Granada Investments* plaintiff alleged breaches of fiduciary duties and securities law violations stemming from claims of self-dealing on the part of controlling shareholders. The district court approved a settlement which called for the court to designate three new directors with no familial relationship to any party. The settlement called for these new directors to serve on the audit and compensation committees and created a special committee to review and approve incentive and bonus compensation, inter-

corporate transactions more than $500,000, as well as other transactions which could potentially involve self-dealing. The United States court [*sic*] of Appeals for the Sixth Circuit, in *Granada Investment*, noted:

> Admittedly, the fairness of a settlement is more difficult to determine when non-pecuniary benefits are provided to the corporation. Nonetheless, [the corporation] was released from all liability based on claims that might have been asserted by [the plaintiff]. In addition, the settlement called for changes in corporate governance. Against the background of a Posner-dominated board, the settlement provided for three new strategically placed directors and for a new special committee with oversight powers.

962 F.2d at 1206; *Cf. Levin*, 59 F.R.D. at 367, fn. 38 ("the fact that the form of the settlement decided upon is somewhat unusual in that it includes some benefits which cannot be evaluated in financial terms, does not militate against its acceptance; the parties are permitted great freedom in shaping the form of settlement consideration").

Finally, in *In Re Caremark International, Inc. Derivative Litigation*, 1996 WL 549894 (Del. Ch.), the court approved settlement of derivative claims following indictment and a guilty plea by the corporate entity to federal charges stemming from its unlawful payment of medical referral fees. Prior to the settlement with the derivative plaintiffs, the corporation's board had taken several steps aimed at increasing management supervision, modifying company policies concerning referral fees and strengthening its internal audit plan. In settling the derivative claims, the company and its directors agreed to additional governance changes, but the director defendants paid no money to the company. The *Caremark* court stated

> In light of the fact that the *Caremark* board already has a functioning committee overseeing corporate compliance, the changes in corporate practice that

> are presented as consideration for the settlement do not impress one as very significant. Nevertheless, that consideration appears fully adequate to support dismissal of the derivative claims of director fault asserted, because those claims find no substantial evidentiary support in the record and quite likely were susceptible to a motion to dismiss in all events.

1996 WL 549894 at page 12.

In the present case, the corporate therapeutic benefits which are received are of a type which could not have been attained by the Plaintiffs had they been successful in the litigation. Furthermore, the monies paid by the Defendants, or on their behalf, constitute funds which most probably would not be recovered by the Plaintiffs should the litigation continue. Thus, the monetary benefits received, taken together with the corporate therapeutic benefits, constitute more than substantial consideration for the proposed settlement to be deemed fair, adequate, and reasonable.

D. THE OBJECTIONS TO SETTLEMENT SHOULD BE OVERRULED.

As set forth previously, the objections of Messrs. Berns, Chiara and Scott are directed toward the request for attorney's fees which may be presented herein by the Plaintiffs. ADM takes no position as to these objections. The objections of Mr. and Mrs. Pauly, and the objections of John Gilbert and Martin Glotzer, are directed more to the substance of the settlement, and ADM responds thereto.

Mr. and Mrs. Pauly object because they assert that if the litigation brought by the Plaintiffs had merit, the settlement is insufficient in comparison to the monies which ADM might receive at the conclusion of the litigation, and that if the litigation is without merit, the Plaintiffs should receive nothing. Simply because the monetary amount proposed in a settlement is a fraction of what

could possibly be recovered does not render the proposed settlement inadequate or unfair. *Susquehanna Corp. v. Korholz*, 84 F.R.D. 316, 322 (N.D. Ill. 1979); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2nd Cir. 1974). Indeed, a proposed settlement is a compromise. Even if the cause of action asserted by the Plaintiffs was meritorious and would be successful, there is no guarantee that the monies recovered would be equal to or exceed the funds received in settlement or would exceed the value of the corporate therapeutics involved in the presently proposed settlement. Thus, the objections or Mr. and Mrs. Pauly are no different from potential objections to the settlement of any litigation where liability is contested, and the District Court should overrule those objections.

Mr. Gilbert and Mr. Glotzer present an objection, asserting that the corporate therapeutics, while perhaps beneficial, "do not go far enough". In essence, Mr. Gilbert and Mr. Glotzer ask the District Court to impose an additional term into the settlement, requiring cumulative voting. Mr. Gilbert and Mr. Glotzer state that approximately twenty-five percent (25%) of the shareholders voting in the most recent election voted for a proposal which would require cumulative voting, but they fail to acknowledge fully that the vast majority of shareholders voting on the issue voted against such a proposal. Furthermore, the term which these individuals propose to include in the settlement has not been the subject of negotiation, nor has it been the subject of the notice sent to the shareholders. Quite simply, this term might cause the number of objectors to increase, something which the District Court cannot divine. It is not up to the District Court to reopen and enter into negotiations in the hope of improving or changing the settlement in order to meet objections. *Levin v. Mississippi River Corp.*, 59 F.R.D. 353, 361 (S.D.N.Y. 1973). The settlement which is presently before the District Court is a matter which was the subject of intense negotiations and compromise. The additional term which is requested by Messrs. Gilbert and

Glotzer was not the subject of those negotiations, and is not properly brought within the settlement proposed.

For these reasons, the District Court should overrule the objections to the proposed settlement and approve the settlement in the form presented by the parties.

CONCLUSION

The settlement presently before the District Court is beneficial to ADM and its shareholders. Furthermore, the settlement terminates the risk, uncertainty, and distraction which accrues from all shareholder derivative litigation. Finally, the settlement provides benefit to the shareholders of ADM which benefit might not otherwise be available from litigation, and the corporate therapeutics which are included within the settlement most certainly would not be available solely as a result of continued litigation, even if successful.

The objections, filed to date which are directed to the substance of the settlement, as opposed to the potential claim for attorney's fees, lack merit in their entirety. One objection would effectively bar settlement in any litigation requiring court approval where liability is contested. The other objection involves a request by certain shareholders to require cumulative voting, which request was opposed by a majority of the shareholders of ADM during the last election where this issue was raised. If cumulative voting is to be instituted at ADM, such is more properly the result of democratic voting as opposed to judicial fiat.

For the reasons stated herein, the settlement proposed by the parties should be approved in its entirety.

[Listing of Counsel Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

AFFIDAVIT OF MICHAEL P. DOOLEY

Michael P. Dooley, being duly sworn, deposes and says:

1. I am the William S. Potter Professor of Law at the University of Virginia. I have taught Corporation Law and related subjects since 1968 with a special emphasis on corporate governance. Among the courses I have taught are Corporate Governance and Finance and Courts and Corporate Governance, the latter in the Law School's LL.M. Judge's Program. I am the Reporter for the American Bar Association's Model Business Corporation Act and a member of the ABA's Committee on Corporate Laws and Corporate Practice Committee. I have also served as a member of the ABA's liaison committee for the American Law Institute's Corporate Governance Project and as a member of the Legal Advisory Committee to the New York Stock Exchange. I have been a consultant to or expert witness for a number of publicly held corporations on a variety of corporate governance matters and have served in similar capacities for the Attorney General of the Commonwealth of Virginia and the Virginia General Assembly. My recent publications in this area include "Two Models of Corporate Governance," 47 *Bus. Law.* 461 (1992), a book, *Fundamentals of Corporation Law* (Foundation Press, 1995), and a monograph, *A Practical Guide for Corporate Directors* (National Association of Corporate Directors, 1996). A copy of my resume is attached and incorporated by reference.

2. In December, 1995 and January, 1996 I acted as a consultant to the Governance Committee of the Board

of Directors of Archer Daniels Midland Company (ADM). The Committee, consisting of five independent directors, was created by the Board at its October, 1995 meeting following the Annual Meeting of Shareholders. The Committee was appointed in response to a number of issues that had been raised by shareholders in litigation, in direct communications to the Board before and during the Annual Meeting and in shareholder resolutions proposed for the Proxy Statement. In general, the issues raised by shareholders were related to perceptions that the ADM Board was insufficiently independent of management and lacked the necessary structures to assure effective oversight. These criticisms were echoed in the press. Accordingly, the Committee was charged with conducting a critical review of ADM's corporate governance structures and practices and making recommendations for changes that would reflect the best practices followed by other leading American corporations. To that end, the Committee surveyed the corporate governance structures of other corporations, studied recent changes that other large corporations had adopted and conducted an exhaustive review of the corporate governance literature from conferences and business and academic publications.

3. The Committee's deliberations resulted in the attached Governance Committee Report, which was unanimously approved by the Committee members for consideration by the full Board of Directors at its January 15, 1996 meeting. The Report recommended far reaching changes in the governance practices of ADM, all of which were designed to increase the effectiveness of the Board's independent oversight functions and to move ADM to a leadership position in corporate governance. Among other things, the Report called for a reduction in Board size, limitations on the number of management directors and a commitment to a majority of "outside directors" on the Board and delegation of important oversight responsibilities to committees comprised of a majority of outside directors. The Report was initially presented to

and discussed at a pre-Board meeting on January 14, 1996 (which I attended) and unanimously approved by the Board at its regular meeting the following day.

4. It was recognized that many of the Report's recommendations could not be implemented immediately but would be phased in over time. Several important changes were made in the months immediately following adoption of the Report, however. These included a reduction in Board size from 17 to 12 members as of the October 1996 Annual Meeting, the resignation of all management directors except the Chief Executive Officer, the adoption of a mandatory retirement age for directors joining the board as of the 1996 Annual Meeting and the nomination (and subsequent election) of three new "outside directors."

5. I have reviewed the additional changes in corporate governance procedures that are proposed in Exhibit "A" to the Settlement Agreement. In my opinion, the proposed Settlement will strengthen the 1996 Governance Committee Report's commitment to effective and independent Board oversight by implementing some of the Report's recommendations and enhancing others.

6. Comparing the ways in which the ADM Board operated prior to the filing of these shareholder derivative suits and the manner in which it will operate upon approval of the proposed Settlement, some of the more important changes are as follows:

(i) Inclusion in the By-laws of the principles establishing the basic relationship between the Board and management.

(ii) A majority of the Board will consist of directors meeting a more restrictive and comprehensive definition of "outside director" that meets or exceeds accepted legal standards for director independence.

(iii) A guarantee of direct access by the Board to senior management.

(iv) An extension of the duties of the Audit Committee to include the establishment of effective legal compliance and information and reporting systems. The Audit Committee is required to report regularly on the effectiveness of ADM's policies in these respects. In addition, the Settlement provides for outside independent counsel to advise the Audit Committee for a period of at least three years.

(v) The establishment of separate Audit, Compensation and Nominating Committees to be comprised exclusively of outside directors and a Succession Committee to consist of a preponderance of outside directors.

(vi) The realization of the Governance Committee Report's endorsement of the "lead director" concept by creating the new office of Vice Chairman to be chosen by and from the ranks of the outside directors whenever the office of Chairman of the Board is not held by an outside director.

(vii) The creation of a Governance Committee, consisting of all nonmanagement directors, to review and assess the performance of the Board and its Committees at least annually. The Governance Committee, over which the Vice Chairman presides, will also establish performance criteria for evaluating the Chief Executive Officer and disclose those criteria and results of its evaluation to the shareholders annually.

(viii) The capping of director compensation at not more than $100,000 per year and providing

for payment of at least half of director compensation in ADM shares.

(ix) The encouragement of broader search procedures for new directors by providing that the Nominating Committee for the election of directors at the 1997 Annual Meeting will be restricted to those outside directors who were first elected to the Board after June 25, 1995.

7. Upon approval of the Settlement, the corporate governance policies of ADM will have been completely transformed from those that existed in June, 1995. Whereas ADM's Board of Directors then consisted of 17 members, most of whom had served for many years and many of whom also had management positions, the new ADM Board consists of 13 members with a clear majority of outside directors. Whereas the Chief Executive Officer was then seen to dominate the Board, the office of Chief Executive is now clearly accountable to the Board in fact, as well as theory, and the CEO is the only management director on the Board. The decisive role in the new ADM Board will be played by its outside directors who will consitute both a majority in numbers and the exclusive membership of the key standing Committees of the Board. Through the adoption of a mandatory retirement age and regular self-assessment, ADM's governance structure will also insure against stagnation and complacency in the years to come. The new structure also directly addresses what were perceived to be deficiencies in ADM's communications with its shareholders and other important constituencies. A newly created Public Policy Committee will be responsible for assuring that ADM meets its social responsibilities and for regularly communicating with institutional investors, analysts and others regarding those important issues.

8. While ADM's proposed governance structure reflects the consensus view of best corporate practice, it goes

beyond mere aspiration to establish a workable set of concrete principles that can and will be followed in practice. In my judgment, approval of the Settlement will move ADM to the very forefront of American corporations in terms of corporate governance and mark it as a leader in that field.

/s/ Michael P. Dooley
MICHAEL P. DOOLEY

Sworn to in Albemarle County,
Virginia, this 27th Day of June, 1997. Before:

/s/ Patricia B. Graham
Notary Public
My Commission Expires: August 31, 1997

RESUME

Michael P. Dooley
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I. *Personal*

Born, Iowa City, January 16, 1939.

II. *Academic Record*

B.A., Political Science, 1960, University of Iowa; J.D., with high distinction, 1963; University of Iowa; Comment Editor, *Iowa Law Review*, 1962-63; Order of the Coif.

III. *Employment History*

Associate, Dewey, Ballantine, Busbby, Palmer & Wood, New York, New York, 1963-1968.

Associate Professor and Professor, University of Illinois College of Law, 1968-1972.

Visiting Professor, University of Virginia School of Law, 1971-1972; Professor 1972-1980; Henry L. and Grace Doherty Professor 1980-1990; William S. Potter Professor since 1990; Sullivan & Cromwell Research Professor 1992-95.

Visiting Professor, University of Michigan, Summer, 1974; University of Southern California, Summer, 1977; Salzburg Seminar in American Law and Legal Institutions, 1986.

IV. *Publications*

"The Effects of Civil Liability on Investment Banking and the New Issues Market," 58 *Va. L. Rev.* 776 (1972).

"Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem," 63 *Va. L. Rev.* 1 (1977) (with J. Hetherington).

"Should Management's Control of the Corporation be Weakened and that of the Shareholder Strengthened?" in *The Attack on Corporate America: The Corporate Issues Sourcebook* 82 (M. Johnson ed., McGraw-Hill, 1978).

"Have Delaware's Incorporation Laws Set a Bad Example for Other States?" in *id.* at 145.

"Enforcement of Insider Trading Restrictions," 66 *Va. L. Rev.* 1 (1980).

Controlling Giant Corporations: "The Question of Legitimacy" in *Corporate Governace Past and Future* 28 (H. Manne ed. 1982).

"European Proposals for Worker Information and Co-Determination: An American Comment," in Harmonization of Laws in the European Communities, 126 (Herzog, ed. 1983).

"The First Amendment and the SEC: A Comment," 20 Conn. L. Rev. 335 (Winter 1988).

"The Role of the Board in Derivative Litigation: Delaware and the Current ALI Proposals Compared." 44 *Bus. Law.* 503 (1989) (with E. N. Veasey), reprinted in *The American Law Institute Corporate Governance Project in Mid-Passage: What Will It Mean to You?* (National Legal Center for the Public Interest 1991).

A Practical Guide for Corporate Directors (National Association for Corporate Directors, 1996).

"Two Models of Corporate Governance," 47 *Bus. Law.* 461 (1992).

Fundamentals of Corporation Law (Foundation Press, 1995).

V. *Published Speechs and Remarks*

ABA National Institute, *Dynamics of Corporate Control V: The Sea Change in Corporate Governance and Litigation Issues in the 1990s* (1991).

Symposium: Punitive Damages, 56 So. Calif. L. Rev. 155 (1982).

Business Roundtable/Emory Univerity Law and Economics Center Conference on *Remedies Under the ALI Proposals,* 71 Corn. L. Rev. 357 (1986).

Response to Perkins, *The Genesis and Goals of the ALI Corporate Governance Project,* 8 Gardozo L. Rev. 695 (1987).

Liberty Fund Symposium on *The First Amendment and Securities Regulation,* 20 Conn. L. Rev. 383 (1988).

VI. *Subjects Taught Recently*

Corporate Financial Transactions: Principles and Practice

Corporate Governance and Finance

Mergers and Acquisitions

Contracts

Securities Regulation

Torts

VII. *Miscellaneous*

Director of Graduate Studies

Reporter, ABA Model Business Corporation Act (1996-)

Member, Legal Advisory Committee, New York Stock Exchange Board of Directors (1991-1995)

Member, ABA Committee on Corporate Practice (1995 to date)

Member, ABA Committee on Corporate Laws, (1983-1990) and (1996-)

Member, ABA Corpro Committee (Section Liaison with ALI, Corporate Governance Project) (1984-93)

Member, ABA Task Force on Executive Compensation
Member, Virginia Bar Association Corporate Code Task Force

Chair, Business Law Section, American Association of Law Schools (1986-87), Executive Committee (1981-87)

Ruby R. Vale Distinguished Academic, Widener University School of Law (1996)

Outside Evaluator, George Mason University Law School (1988) (Report prepared for GMU Vice Provost for Academic Progress)

Member of Southern Association Colleges and Schools Reaccreditation Team for Emory University (1993)

Consultant, Attorney General of Virginia and Joint Legislative Audit and Review Committee

Co-Reporter, Virginia Bar Association project to revise the Virginia Stock Corporation Act (1973-74)

Member, ABA Federal Regulation of Securities Committee and Legislation Subcommittee (1974 to 1980)

Member, New York, Illinois and Virginia bars

Lecturer or panelist, numerous bar and academic seminars

October 1996

GOVERNANCE COMMITTEE REPORT TO THE BOARD OF DIRECTORS OF ARCHER DANIELS MIDLAND COMPANY

The Mission of Archer Daniels Midland Company has been to develop a global processing firm that produces high quality food, feed, fuel, and pharmaceutical products from agriculture at the lowest cost possible and in a manner that is responsive to the ethical, legal, institutional, and social priorities of society. The Company's purpose is to add value to raw materials to feed the world. We have succeeded in our mission, and we intend to continue to do so in a way that maximizes shareholder return over time. With the likely doubling of the world's population over the next twenty-five years, we have a special responsibility both to the developing world and the developed world to be the "Supermarket to the World." This is the challenge that we, as a Board of Directors, must shoulder in leading ADM into the next century.

As we look into the next century, we see an opportunity to establish policies and procedures of corporate governance that facilitate our corporate mission. The following principles will guide our actions in the coming years. Succeeding Boards of Directors periodically should review these policies, and the effectiveness of our corporate procedures, to assure that the Company has the governance structures necessary to achieve our goals profitably and responsibly and that the Board remains accountable to the shareholders for its actions.

Principal Duties of the Board.

The Board of Directors is to oversee, not manage, the business and affairs of the Company. The Board should select the Chief Executive Officer and regularly evaluate and appropriately compensate the CEO and senior management of the Company. The Board should develop

and review management succession plans and approve the major strategies and financial objectives of the Company. The Board should provide advice and counsel to senior management, and select and recommend to shareholders an appropriate slate of candidates for the Board of Directors. The Board should periodically review its own performance, its committee structure, the quality of its communications with management, and its handling of critical issues of corporate planning and leadership succession in management and on the Board itself.

Independence of the Board of Directors.

The Board of Directors should have appropriate structures and policies to ensure that the Board acts at all times in the best interests of the Company and its shareholders. The Company looks to outside directors to provide an independent view of the performance of the Company and its management. Accordingly, to assure the highest standards of independent judgment and accountability, a majority of the Board should be comprised of outside directors.

Outside and Nonmanagement Directors Defined. An "outside director" means a director who (a) is neither a current employee nor a former member of senior management of the Company; (b) does not have any personal business or professional relationship with the Company that is material to it or to the director; (c) does not have a close family relationship with any member of senior management; and (d) is not receiving compensation from the Company in any capacity other than as a director. A "nonmanagement director" means a director who is not a current employee of the Company.

Management and the Board. The Chief Executive Officer should be a member of the Board of Directors. In order to assure the greatest number of

outside directors on a board of manageable size, other direct management representation should be kept to a minimum and should, in no event, exceed one or two other management directors.

The Board of Directors should make clear to senior management of the Company that board membership is neither necessary to their present positions nor a prerequisite to a higher management position in the Company. Attendance of management staff at Board Meetings should be at the discretion of the Chairman but should be encouraged by the Board. The Board should have full and direct access to members of senior management and should be encouraged to request reports directly to the Board by any member of senior management. Board members should use judgment in dealings with management so that they do not distract management from the business operations of the Company.

Conflicts of Interest. A director's personal financial or family relationship may occasionally give rise to that director's material personal interest on a particular issue. The Board of Directors should determine whether such a conflict of interest exists on a case-by-case basis. The Board should take appropriate steps to identify such potential conflicts and to assure that a majority of the directors voting on an issue is disinterested with respect to that issue.

Leadership of the Board.

Chairman of the Board. The Board of Directors should decide annually whether it is in the best interests of the Company that the Office of Chairman of the Board and Chief Executive Officer of the Company be separate or vested in the same person.

Lead Director. If the offices of Chairman and Chief Executive Officer are combined in one person,

the outside directors should annually elect one of their number to serve as Lead Director. The Lead Director should preside over all meetings of nonmanagement directors and should perform such other duties and functions as the outside directors may assign. The nonmanagement directors should meet together at least annually, without management present, to evaluate Company performance.

Board Composition.

It is important that the Board include members with the personal qualities and business experience that taken together will assure a strong Board of Directors. The principal qualities of an effective corporate director include strength of character, an inquiring and independent mind, practical wisdom and mature judgment. Special emphasis should be placed on diversity of the Board of Directors. The Board should include members who enable the Company to maintain relationships with customers and other constituencies and to respond to developments in the markets in which the Company operates.

The Board may vary in size and composition as circumstances require. The Board should consist of a minimum of nine members and a maximum of fifteen members. Current nonmanagement directors younger than seventy and new nonmanagement directors should not be candidates for the Board of Directors after reaching their seventieth birthdays. The Board should reduce its current size to reflect a majority of outside directors by the next Annual Meeting, and any interim board member appointment should be made in a manner consistent with these principles.

The CEO should develop an orientation program for new members of the board, including arranging for each new director to meet privately with key members of senior management and to tour the Company's principal facilities.

Evaluation of the Chief Executive Officer.

All nonmanagement directors should participate in the establishment and approval of performance criteria for evaluation of the CEO. The Chairman of the Board of Directors, if separate from the CEO, or the Lead Director, should preside over an annual evaluation of the performance and compensation of the CEO. All nonmanagement directors should participate in the establishment and approval of performance criteria for this evaluation and in the actual evaluation of the CEO. Performance in relation to the established criteria should be used to determine the compensation of the CEO.

Communication with Shareholders.

Primary responsibility for communication with shareholders should rest with the CEO. The CEO should undertake shareholder communications on all matters except board policies, in which matters the Chairman of the Board may be the more appropriate person to handle the communications if the offices of Chairman and CEO are separate. Members of the Board of Directors may, from time to time, be called upon by the Chairman or the CEO to assist in such communications.

Procedures for Meetings.

Board members should plan to attend all board meetings and all meetings of committees to which they have been appointed. Agenda and materials submitted for the information of, or for action by, the Board should be submitted to each member at least ten days in advance of the scheduled meeting, if possible. Similarly, such materials prepared for committee meetings should be distributed to committee members at least ten days in advance of scheduled committee meetings. The Board and its committees should schedule a sufficient number of

meetings to allow them to carry out their responsibilities. Board members should review all materials prior to scheduled meeetings and should be prepared to contribute substantively to each meeting. An individual member is entitled to add to the agenda for board or committee meetings any matter that the director reasonably believes should be on the agenda. Board members are expected to maintain the confidentiality of all materials designated as confidential.

Committees of the Board.

The Board of Directors should select committees of the Board as the need arises. Specific responsibilities of the committees would be assigned but the Board reserves to itself the discretion to disband or to create new committees as circumstances dictate. The Chairman, in consultation with the Nominating Committee, should propose committee chairmen and committee assignments annually for Board approval. Members of the various committees should expect to be rotated to new responsibilities on a three to five year basis.

Current committees are Executive, Audit, Nomination, Compensation and Succession, and Corporate Governance, which should evolve into a Public Policy Committee. All committees except the Executive Committee should be made up of outside directors.

Each committee chairman should determine the frequency, length and agenda for committee meetings. Management should provide, on a priority basis, all information necessary for each committee to carry out its responsibilities. Each committee should report to the Board of Directors at the next meeting of the Board of Directors following the committee meeting. Each committee should have a formal written charter, encompassing at least the major responsibilities described below.

The Executive Committee. The Executive Committee should consist of the CEO and a majority of

outside directors. The Executive Committee is to meet only in those circumstances when a quorum of the Board cannot be convened in a timely manner and the Chairman deems prompt Board action or advice to be in the best interests of the Company, subject to any limitations on the Executive Committee's authority as may be imposed by the Board of Directors.

The Audit Committee. The Audit Committee of the Board of Directors should review the over all plan of independent audit of the Company, the scope of audit procedures, the Company's financial statements, the performance of the Company's independent accountants and internal auditors, and the auditors' evaluation of internal controls. The Audit Committee also should have responsibility to act as liaison between the auditors and management on any areas of material dispute and to discuss with management the Company's major financial risk exposures. The Audit Committee should report at least annually to the Board of Directors on the Company's material litigation risks and significant accounting issues affecting the Company's operations or financial performance.

The Nominating Committee. The Nominating Committee of the Board of Directors should determine the criteria for candidates for the Board of Directors and submit such criteria for full Board approval annually. The Nominating Committee should consider a candidate's skills, technical knowledge, leadership, diverse background and other specific criteria appropriate for the current needs of the Company and consistent with the obligations of board service described in this report. Special emphasis should be placed on diversity of the Board of Directors.

The Nominating Committee should consider any candidate suggested in writing by a shareholder at least one hundred and twenty days prior to the annual meeting when that suggestion is accompanied by appropriate qualifications and a statement signed by the nominee indicating a willingness to serve on the Board of Directors. Upon approval of the Board of Directors, the Chairman of the Nominating Committe should extend invitations to candidates to accept nomination to the Board of Directors.

The Nominating Committee also should undertake the duties of self-assessment and board evaluation described above. Term limits should not be imposed upon any board member, but the Nominating Committee should evaluate the performance during the preceding term of each board member whose renomination is being considered. Board members whose job responsibilities change during the preceding year should advise the Nominating Committee of their changes in circumstances and describe any impact which the changes may have upon their board service.

The Compensation and Succession Committee. The Compensation and Succession Committee should review and recommend to the Board of Directors the annual compensation and benefits of senior management, review new executive compensation programs and evaluate the operation of current executive compensation programs, periodically review policies for the administration of executive compensation programs, and periodically review policies regarding executive perquisites. The Compensation and Succession Committee should review the advisability of a formal plan for an annual or long-term incentive program for senior management. The Compensation and Succession Committee also should be charged with developing, with management, detailed plans of succesion and executive development.

The Public Policy Committee. After its present assignment is completed, the Governance Committee should become a committee of social responsibility designated as the Public Policy Committee. This committee would oversee matters of legal compliance, including issues of potential discrimination, antitrust, foreign corrupt practices act enforcement, and environmental conduct as well as any other issues which have significant social implications anywhere in the world. The Public Policy Committee also should oversee the Company's policies and procedures regarding compliance with the law, and the adequacy of the Company's procedures for circulating these policies, educating all employees regarding these policies, and assuring adherence to these policies by all employees.

Technical Advisory Council.

The Board of Directors encourages the CEO, in his discretions, to create a Technical Advisory Council. The Council would consist of outstanding men and women who are not members of the Board of Directors but whose special expertise in matters related to the Company's business may be helpful to the Company.

Board Compensation.

Each year the Compensation and Succession Committee should review the status of board members' compensation in relation to the practices of similar, large companies and make recommendations for the following year to be considered by the full Board. The level of compensation paid should take into account the responsibilities and risks of board service and should be commensurate with the compensation of directors at similar companies. Compensation should be directed toward tying board performance to Company performance so that board members have a financial incentive to act in the best long-term interests of the Company.

Eligible board members should receive one-half of their compensation in cash and one-half in appropriate forms of stock interests. A portion of the cash compensation should be deferrable at a director's option. The Company should not provide health or retirement benefits to non-management directors by reason of their board service.

Dated: January 15, 1996.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

OBJECTIONS OF CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM AND FLORIDA STATE BOARD OF ADMINISTRATION TO PROPOSED SETTLEMENT OF DERIVATIVE ACTIONS

Preliminary Statement

By Order dated May 30, 1997, the Court invited comments from all shareholders of defendant Archer Daniels Midland Company ("ADM") on a proposed Stipulation of Settlement dated May 29, 1997 ("Settlement") that would, if approved, provide for an award of *as much as $4 million in payments to the plaintiffs' lawyers and experts* (more than half the total cash consideration of the Settlement, with the remainder to go toward *other* lawyers' fees) and the adoption of substandard corporate governance policies that the company, in any event, had for the most part already agreed to adopt.

It is not surprising that the lawyers seek to rush this deal through the Court;[1] it cannot pass careful scrutiny.

[1] The Court, urged by the lawyers who stand to benefit most (if not exclusively) from the proposed Settlement, has provided little time within which the truly interested parties—the shareholders—may object. Under the schedule proposed by the lawyers and approved by the Court, the shareholders had only to July 3, 1997, to lodge their written objections, with the hearing on final approval set for only four days later (July 7). Because the notice of this proposed Settlement was provided to many major holders (such as the shareholders filing the instant objections) only recently, there has not been adequate time for preparation of materials supporting the objections. Accordingly, objectors respectfully request that the Court, at very least, adjourn the hearing for one month so that objecting shareholders may have the opportunity to provide the Court with materials in support of their objections in advance of the hearing, and all shareholders objecting to this proposed resolution may be fully heard. It is settled that objecting shareholders should be permitted a full opportunity to develop a factual record and be allowed meaningful participaton in the hearing. *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1314-15 (3d Cir. 1993).

It benefits only the lawyers, and at the expense of the ADM shareholders who have already been ill-served by both ADM's board and plaintiffs' lawyers. The Court should derail this speeding (gravy) train. It should insist on careful consideration, after proper notice to shareholders and an *adequate* opportunity for them to submit reasoned objections and materials in support of such objections. Such careful scrutiny will show that what is proposed as a victory for the ADM sharehoders is, in fact, gorging by lawyers in return for acquiescence to unacceptance governance practices.

Interests of the Objectors

Objector California Public Employees' Retirement System ("CalPERS") is the nation's largest governmental ("public") pension fund: it manages assets with a current market value of more than $110 billion on behalf of over one million U.S. citizens who are its employees and beneficiaries. CalPERS currently owns more than 2.8 million shares of ADM stock, and on information and belief is one of the largest single holders of ADM shares.

Objector Florida State Board of Administration ("SBA") is also a large public pension fund, with assets having a market value of over $83.3 billion for the Florida Retirement System Trust Fund, the Local Government Surplus Funds Trust Fund, and other various trust funds on behalf of 586,796 employees and 149,571

current beneficiaries. SBA currently owns 1,765,977 shares of ADM stock.

Objectors CalPERS and SBA are, on information and belief, the largest ADM shareholders that have taken any public position on the proposed Settlement.

Lawyers for the nominal plaintiffs contacted the Council of Institutional Investors ("Council")—a prominent organization of large institutional shareholders, whose members control more than $1 trillion in assets—regarding this litigation. CalPERS and SBA, who are both members of the Council, informed ADM that major shareholders would object to the proposal as inadequate and unfair to ADM shareholders, for the reasons stated in this memorandum. ADM has ignored these objections and instead has pressed forward for Court approval of the proposed Settlement. *See* Declaration of Ann L. Yerger ("Yerger Decl.") ¶¶ 9, 10.

Argument

THE PROPOSED SETTLEMENT SHOULD BE REJECTED AS INADEQUATE AND UNFAIR TO THE SHAREHOLDERS OF ADM

It is a matter of public record that the management of ADM as been accused of, and has admitted culpability to, grave misconduct. *See* Declaration of Steven F. Benz ("Benz Decl."), Exhiabits B - J (collecting press reports of ADM plea and settlement agreements). The instant lawsuit was filed, ostensibly, to provide redress to the corporation and its shareholders. Counsel for the nominal plaintiffs [2] claimed that ADM suffered more than

[2] As is typically the case in a derivative action, nominal plaintiffs here have little if any demonstrated interest in the litigation. There is no indication that they hold a substantial number of ADM shares —in contrast to the substantial holdings of objectors CalPERS and SBA. As many courts and commentators have noted, it is the lawyers and not the plaintiffs who effectively function as the parties

$190 million in damages as a result of the misconduct alleged in the complaint,[3] and acknowledged in writing to the Council of Institutional Investors that "a primary goal of our litigation is to recover for ADM as much of the wasted $190 million as is realistically and reasonably possible . . . ." Yerger Decl., Exhibit A. Counsel also vowed to install effective governance provisions that would prevent further misconduct. *Id.*

But since the action was filed, virtually nothing has been done to achieve those goals. After defendants filed a motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), it appears that the case became dormant. No motions were litigated (including the Rule 12(b)(6) motion); discovery soon reached impasse, if it ever began. *See* Settlement at 4-5.[4]

in a derivative action. *E.g., Bolger*, 2 F.3d at 1309 (in derivative actions "the client, as principal, is neither well-situated nor adequately motivated to closely monitor and control the attorney"); K. Winter, *Paying Lawyers, Empowering Prosecutors and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 948 (1993) (in derivative actions named "plaintiffs are generally figureheads"); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Col. L. Rev. 669, 677-78 (1986) (in derivative actions "the actual client generally has only a nominal stake in the outcome of the litigation" and cannot closely monitor and control the attorney's conduct).

[3] Plaintiffs' expert, Mr. Miller, opines that the damages far exceed $190 million, and that a conservative estimate would be $250 million or more. *See* Declaration of R. Alan Miller ("Miller Decl.") ¶ 11.

[4] Objections are unable to determine, from the Settlement and related pleadings what, if any, discovery counsel claim to have done, since they make no reference to any specific discovery taken. The Court's docket sheet, moreover, reflects only that a motion to dismiss was filed—and never ruled upon, and that there were motions to compel discovery that, with consent of the lawyers, were deferred no less than *seven* times and ultimately never ruled on. Benz Decl., Exhibit A (Civil Docket for Case No. 95-CV-2279).

Having done little but wait, the lawyers then entered into what can only be characterized as a sweetheart deal with defendants: Defendants obtain Court-sanctioned releases for virtually all of their misconduct in return for (1) payment of a total of $8 million (with up to 49 percent of this—and perhaps more, if interest is included—earmarked for the attorneys), Settlement at 15; and (2) adoption of a diluted set of "corporate governance" principles that not only lag behind those of ADM's corporate peers but improve little if at all on reforms that were agreed upon prior to, and independent of, the Settlement. *Id.* at 13.

Under the settled standards of Rule 23.1 for judicial review of proposed settlements (Point I, *infra*), this Settlement cannot possibly pass muster. First, the Settlement provides virtually all of its benefits to the *attorneys* for the nominal plaintiffs. (Point II, *infra*). Second, the supposed jewel of the proposed Settlement—the exalted governance principles—are neither jewels nor the fruits of the lawyers' labor. These principles, which are substantially weaker than those now routinely adopted throughout corporate America, were for the most part implemented by ADM long before the Settlement was reached. (Point III, *infra*).

Moreover, the proposed Settlement represents a squandered opportunity to enact truly meaningful governance for ADM—a company perhaps more in need of it than any other public company in the United States. Close to half of the ADM shareholders voted for rigorous and meaningful standards of director independence at the last annual meeting. The lawyers' willingness to settle for watered-down rules, in what appears to be *quid pro quo* for enormous and unjustified fees, strongly suggests that the Settlement was collusive and is not in the shareholders' best interests.

In any event, the unseemly rush to approval should be halted; if the Court does not reject it outright, the Court's

obligation under Rule 23.1 to conduct an informed and independent review of the proposed Settlement, and to hear the objections of shareholders who have only recently been informed of this resolution, require the deferral of any final decision to approve the Settlement until after all interested parties have been provided with an appropriate opportunity to present their objections, and materials supporting the objections, to the Court. Since this opportunity has not yet been provided, and the scheduled hearing (on July 7) will not provide the shareholders with a fair opportunity to contest this unfair proposal, the Court should defer the hearing for at least one month.

I. THE COURT MUST EXERCISE INDEPENDENT JUDGMENT TO DETERMINE WHETHER THE PROPOSED SETTLEMENT IS FAIR

Under Rule 23.1, the "action shall not be dismissed or compromised without the approval of the court . . . ." "Under FRCP 23.1, the court has a duty to determine whether the settlement reasonably protects the interests of the corporation and its shareholders." *In re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1179, 1186 (N.D. Cal. 1993), *citing Mathes v. Roberts*, 85 F.R.D. 710, 713 (S.D.N.Y. 1980). In reviewing a proposed settlement of a derivative action, "[t]he generally accepted standard is that the agreement must be fair and adequate in light of the interests of all the parties." 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1839 at 182 (1986 & Supp. 1997). Before approving the proposed Settlement, the Court "must consider its fairness, reasonableness, and adequacy." *Moore's Federal Practice 3d* § 23.1.10[2][a] at 23.1-58 (1997).

The Court "must also ensure that there are no fraudulent or collusive features of the settlement." *Id.* ("Derivative actions pose the inherent risk that the representative plaintiff will collude with the defendant to forego the

derivative claims in exchange for a settlement that is only favorable to the representative plaintiff and his or her attorneys."); Wright, Miller & Kane, *supra,* § 1839 at 182-84 ("Settlement proposals . . . that do not appear to have been reached as the result of arms length negotiations . . . will not be approved."); *id.* at 191 ("the court should be on the lookout for signs of bad faith or collusion among the parties to the proposed compromise"). As Mr. Coffee has observed, many derivative actions result in settlements that "benefit[] the attorneys more than the shareholder." John C. Coffee, Jr., *Understanding the Plaintiffs Attorney: The Implications of Economic Theory for Private Enofrcement of Law Through Class and Derivative Actions,* 86 Col. L. Rev. 669, 673 n.9 (1986).

The burden here is entirely on the proponents of the Settlement. "The proponents of the settlement have the burden of proving that the settlement is in the best interests of the corporation." *Moore's Federal Practice 3d, supra,* § 23.1.10[2][a] at 23.1-58. It is the plaintiffs' attorneys who must therefore prove the fairness and adequacy of the proposed settlement. Wright, Miller & Kane, *supra,* § 1839 at 184-86 ("The burden is on the proponents of the compromise to show that it meets this standard, and the trial court should state its reasons for deciding to approve a settlement so as to provide adequate information for appellate review.").

Held to this exacting standard, the proposal here cannot possibly be found fair, reasonable and adequate in its benefits to ADM and its shareholders.

II. THE SETTLEMENT SHOULD BE REJECTED BECAUSE IT PROVIDES EXCESSIVE BENEFITS TO THE NOMINAL PLAINTIFFS' ATTORNEYS

The total cash consideration achieved in the proposed Settlement is $8 million. Settlement at 12-14. Of that

$8 million, up to 49 percent (more, in fact, if interest is included) is earmarked for payment to the attorneys for nominal plaintiffs. *Id.* at 15. The remainder of the cash is to be used for payment to "outside independent counsel" employed in some vague capacity to assist the ADM board members in discharge of their legal responsibilities. Settlement at 5 & Exhibit A.

There is, accordingly, *no* benefit to the shareholders from the cash portion of the proposed Settlement. It appears that at least half will be paid directly to the plaintiffs' attorneys, as reward for their (non) prosecution of the action; the rest will be used for more lawyers, presumably to remind the ADM directors of their obligation to follow the company's bylaws and other legal requirements. No benefit to ADM or its shareholders is seriously posited from these payments, nor can any legitimate benefit plausibility be put forward. The only real beneficiaries of the arrangement, stated bluntly, are the lawyers. It is axiomatic that settlements provided excessive benefits to the lawyers cannot be approved under Rule 23.1. *E.g., Rosenbaum v. MacAllister,* 64 F.3d 1439, 1443-48 (10th Cir. 1995) (rejecting under Rule 23.1 disproportionate settlement benefitting attorneys); *In re Pittsburgh & Lake Erie R.R. Co. Sec. and Antitrust Litig.,* 543 F.2d 1058, 1070 (3d Cir. 1976) (rejecting settlement where disproportionate cash benefit to plaintiffs' lawyers); *see also* Wright, Miller & Kane, *supra,* § 1839 at 184-85 n.26 (collecting cases under Rule 23.1 in which settlements have been rejected for this reason).

The results do not warrant the excessive fees sought. Plaintiffs seek the Court's approval of a settlement that provides virtually no cash benefit to the corporation—it all goes to the lawyers. The only purported benefit, enactment of supposed "corporate governance" principles, resulted *not* from plaintiffs' efforts but rather from the recommendation of the ADM board's Governance Committee. *See* Point III, *infra.* Moreover the ADM principles fall far short of effective governance. Indeed, they

fall far short of the effective and independent director standards that 41.6 percent of the ADM shareholders voted to approve at ADM's October 17, 1996 Annual Meeting. *See* Declaration of Sarah A.B. Teslik ("Teslik Decl.") ¶ 10. Plaintiffs' lawyers *directly acknowledged* that the Settlement's governance principles were selected precisely because they would not require ADM to change its board *at all*. Yerger Decl. ¶¶ 9, 10.

The effort expended does not justify the excessive fees. The attorneys' own summary of the proceedings to date proves that they have done little, if anything, to prosecute the case.[5] After the filing of defendants' motion to dismiss, they appear to have let the matter sit in suspense despite the known interest of many of ADM's largest shareholders. These holders individually and collectively through the Council offered to assist in the prosecution of the case (and specifically to help structure necessary governance reform). When the Council provided comments to these attorneys, the Council's comments were largely ignored.

According to the lawyers, they can point only to

> consulting with experts in the areas of corporate governance and economics, and with the company's largest institutional investors, and reviewed and analyzed treatises, articles, and authoritative reports on corporate governance issues. In addition, Plaintiffs' counsel reviewed and analyzed thousands of pages of documents produced by defendants, reviewed and analyzed the Company's public filings and press releases, and thoroughly analyzed and evaluated the facts supporting Plaintiffs' claims.

Settlement at 4-5. Perusal of papers and hiring expensive experts aside, it is apparent that the lawyers—who seek up to $4 million in fees—did little to prosecute the action, which may explain why so little of value was achieved notwithstanding defendants' public admissions of wrongdoing. The Court should be leery of approving a settlement where, as here, little if any discovery was done to determine whether plaintiffs were likely to succeed on their claims. *See Bolger*, 2 F.3d at 1314 ("post-discovery settlements are more likely to reflect the true value of the claim and be fair").

The excessive fees support an inference of collusion, and at very least require full and careful consideration by the Court before any approval. That all of the settlement cash has been earmarked for lawyers calls into question the legitimacy of the proposed Settlement. Large payouts to lawyers, coupled with purely spectral, supposed "structural" benefits to the corporation, are harbingers of collusion.[6] In similar circumstances fee claims have been far less. A 1991 study, for example, found that the average fee award in "structural relief" shareholder cases was

[5] In preparing this objection CalPERS and SBA have been hampered by the unduly cramped schedule imposed on the Court by counsel for plaintifis. They have been required to submit their objections, and to divine the basis for what appears on its surface to be excessive benefits for the attorneys, without adequate time to review the fee petitions of the lawyers—which were filed only two days before all written objections had to be filed with the Court. *See* Order Preliminarily Approving Settlement and Providing for Notice, ¶¶ 7, 9 (May 30, 1997). With this impossible schedule, objectors plainly were not given adequate time to prepare and submit their objections to the proposed Settlement and the lawyers' claims to the lion's share of that Settlement. This alone requires deferral of any action by the Court save outright rejection of the proposed Settlement.

[6] Courts and commentaries have recognized that "[o]ne of the risks flowing from shareholders' difficulty in monitoring derivative litigation is that plaintiffs' counsel and the defendants will structure a settlement such that the plaintiffs' attorneys' fees are disproportionate to any relief obtained for the corporation. Plaintiffs' attorneys and the defendants may settle in a manner adverse to the interests of the plaintiffs by exchanging a low settlement for high fees." *Bolger*, 2 F.3d at 1310. "At its worst, the settlement process may amount to a covert exchange for a high award of attorney's fees." Coffee, *supra*, n.2 at 714.

$287,000. Roberta Romano, *The Shareholder Suit: Litigation without Foundation?*, 7 J.L. Econ. & Org. 56, 63 (1991).[7]

Objectors are thus confronted with the stark fact of the lawyers' huge fee demand, unsupported by any facts. At the very least, objectors and other shareholders who may, with adequate notice, choose to object should be afforded a reasonable opportunity to contest this highly suspect resolution.

Accordingly, if the Court does not reject outright this proposed Settlement—as it should, in light of the plainly excessive benefits to the attorneys—it should defer consideration of the Settlement until after all shareholders have been afforded a reasonable opportunity to be heard, with sufficient advance notice to permit them to study all of the relevant materials (including the lawyers' fee petition) and to submit materials supporting their objections sufficiently in advance of such hearing to permit the Court to consider them fully.

III. THE AGREEMENT BY ADM TO ADOPT CERTAIN "GOVERNANCE" PRINCIPLES PROVIDES NO BASIS TO APPROVE THE SETTLEMENT

As the court observed in *Bolger*, "it is difficult to assess the substantive fairness of nonmonetary settlement relief." 2 F.3d at 1314. Such claimed "structural" relief "may be used to mask an unfair settlement that benefits individual defendants and plaintiffs' counsel but not the corporation." *Id.* But no such difficulty is present here, for

[7] The average fee award in "monetary" settlement cases was higher, but still only came to $1.45 million. *Id.* The study also found that in monetary settlement cases, fee awards averaged not more than *24 percent* of the monetary settlement. *Id. See also* 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 14.03, 14-13 to 14-14 (3d ed. 1992) (discussing attorneys' fees in securities and antitrust suits as ranging from 20 to 30 percent).

the non-monetary benefits supposedly achieved in the Settlement are nothing more than the same supposed "reforms," inadequate as they are, that the company adopted more than a year ago.

ADM has long been a poster-child for advocates of effective corporate governance, and most pointedly for those—such as the Council—who seek boards of directors independent of the company's management. Yerger Decl. ¶ 11.[8] Much of ADM's current troubles, in the view of objectors, can be traced to the defendant directors' longstanding blood, personal, professional and financial connections to the company's former CEO.[9]

Nothing in the proposed Settlement, however, solves that problem. Or more precisely, the proposed Settlement advances the cause of effective governance not at all beyond what the company had previously agreed to do, and nowhere near principles that require the ADM board to be comprised of truly effective and independent directors.

What ADM agreed to do prior to the proposed Settlement. On January 15, 1996, in response to the demands of its large institutional shareholders and after waves of negative publicity regarding a panoply of corporate mis-

[8] Richard Koppes, CalPERS' former deputy executive director, stated that the ADM Board, perhaps more than any other company, needs a majority of "truly independent directors." Greg Burns, *A Grain of Activism at Archer Daniels Midland*, Business Week, Nov. 6, 1995, at 44. For years, D. Andreas and ADM have ignored the critics of their insider-dominated board. CalPERS, prior to the October 19, 1995 annual meeting, gave ADM the grade of "F" for its failure to respond to CalPERS corporate governance queries. *Id.*

[9] Directors are responsible for formulating corporate policies and monitoring the activities of management in implementing these policies. Employment, business and family relationships can raise conflicts of interest that may limit the vigilance and diligence of the board. It is in the best interest of all shareholders that a majority of board members be independent "outside" directors.

deeds, the ADM board's Governance Committee issued a report, *Governance Committee Report to the Board of Directors of Archer Daniels Midland Company* (Jan. 15, 1996) ("Report"), which was thereafter adopted in its entirety by the entire board. Teslik Decl., Exhibits C and E. The Report purported to set forth enhanced principles of corporate governance, including proposals purporting to provide for independent directors and safeguards against further depredations by management. *Id.*

ADM shareholders seek the adoption of standards for truly independent directors. In view of objectors, and many other ADM shareholders, the recommendations of the Report did not in fact provide for truly independent directors. ADM's proposed principles allowed persons having substantial financial ties to ADM, and hence lacking independence, to serve as "independent" directors. Yerger Decl. ¶ 10.

To remedy this material defect, objecting shareholders (including CalPERS and SBA) submitted a proposal for vote at the 1996 ADM annual shareholders' meeting. This proposal, which received 41.6 percent of the votes over management opposition, provided that no one with any non-trivial personal or financial interest in ADM could serve as an "independent" director. Teslik Decl. ¶ 10.[10] This definition of "independence," notwithstand-

[10] Under this definition, an independent director is one who:

- has not ben employed by the company or in an affiliated executive capacity within the last five years;
- was not, and is not, a member of the corporation or firm that is one of the company's paid advisors or consultants;
- is not employed by a customer, supplier or provider of professional services to the company;
- has no personal services contract with the company;
- is not employed by a foundation or university that receives grants or endowments from the company;
- is not a relative of the managemnt of the company;

ing widespread support, was not adopted by ADM. Any standard that falls short of it, however, permits interested persons to serve as purportedly independent outside directors, and is no safeguard against the sort of crony-board that has characterized ADM for decades. *Id.* ¶ 9.

The proposed Settlement does not add to the reforms adopted based on the Report. In substance, the proposed governance principles included in the Settlement no more than track the elements of the program adopted in the Report. *See* Teslik Decl. ¶¶ 8, 11, 12, 13 & Exhibit D. They are, in any event, little more than "prudent safeguards any major corporation should have in place without the impetus of a lawsuit." *Rosenbaum,* 64 F.3d at 1446. In those few areas where the Settlement purports to provide *new* requirements, they are of little or no value in the view of institutional shareholders; they appear to be written to seem meaningful when in fact they are gutted by 'fine-print' qualifiers. Teslik Decl. ¶¶ 8, 9.

Most fundamental, however, is the failure of the proposed Settlement to provide the reform sought by almost half of the shareholders at the last meeting: truly independent directors. Under the definition of "outside" or independent director contained in the proposed Settlement, just as in the Report, a director is considered an "outside" director even if he or she has a personal, business or professional relationship with the company, so long as the relationship is not "material" to ADM or to the director. *Virtually no* relationship *any* one human being can have with a big company can *ever* be material *to the company*. This qualifier thus makes the whole definition meaningless. The proposed Settlement falls far short of the effective reform urged by objectors and other major institutional shareholders. And when a company

- is not an officer of a company on which the company's chairman or chief executive officer is also a board member.

See Teslik Decl. Exh. A (Council's analogous "Definition of an Independent Director").

lacks an independent board, all other governance procedures become meaningless. Teslik Decl. ¶ 9.

In light of its failure to address the pivotal issue of independence, the proposed Settlement's few tinkerings with the proposals already adopted in the Report cannot fairly be said to represent any increased value for shareholders. *Id.* ¶ 15 and Exhibit D (comparing in detail the Settlement provisions with the Report provisions). The few changes added by the proposed Settlement are trivial in comparison to the standards of independence that plaintiffs *did not* obtain.

For example, the adoption of confidential voting (meaning those running for company office cannot count the votes) has only surface appeal. Under the proposed Settlement, there will be confidential voting only where it *will not matter*. In other words, there will only be confidential voting when shareholders can't vote against directors—and no confidential voting in contested situations. As a result, this "reform" is entirely without value.

In support of their claim to have added value through corporate governance enhancements, plaintiffs offer only the conclusory affidavits of their paid experts. Neither expert provides persuasive support for the claim that the proposed Settlement—as opposed to the reforms to which ADM had already agreed in the Report—adds substantial value for the shareholders.

Indeed, plaintiffs' two hired experts focus on *all* of the changes in ADM's corporate governance, rather than on *any* changes specifically extracted by plaintiffs in the Settlement. Teslik Decl. ¶ 16. Most of the claimed governance improvements, however, were achieved without refernece to this action. *Id.* ¶ 11, Exhibit D. Moreover, in important respects plaintiffs' experts are simply wrong. *E.g.* Coffee Aff. ¶ 7 (claiming independence provisions of proposed Settlement mirror those of Council, when in fact they do not). Mr. Coffee simply glosses over the critical role of director independence, and he fails even

to address the respects in which ADM's policies fail to provide for independence.

The Court cannot, on the record before it, conclude that ADM shareholders will be afforded substantial benefits through the proposed Settlement because of the supposed enhancements of ADM's corporate governance. The Court should reject the proposed Settlement as it now stands. At the very least, the Court should require the parties to show cause why these corporate governance provisions should not be revised to include provisions appropriately tailored to achieve genuine independence for outside directors. And in no case should the Court approve the proposed Settlement, as presented, until after a reasonable opportunity for the objectors to participate in a full hearing on the merits of the supposed enhancements to ADM's corporate governance.

Conclusion

The Court should reject the proposed Settlement as inadequate. In the alternative, the Court should adjourn the hearing on the approval of the proposed Settlement, for at least a month, to permit objectors and other sharefor at least a month, to permit objectors and other shareholders similarly situated to participate meaningfully through submission of briefs and other materials in advance of the hearing, by presentation of testimony at the hearing, and through cross-examination of the witnesses (if any) called in support of the proposed Settlement.

Respectfully submitted,

[Listing of Counsel Omitted]

Date: July 2, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

DECLARATION OF ANN L. YERGER

Ann L. Yerger hereby declares pursuant to 28 U.S.C. § 1746:

1. I am over eighteen years of age and have personal knowledge of the matters stated herein.

2. I am currently employed by the Council of Institutional Investor's [*sic*] (the "Council") as director of the Council's research service. The Council is located at 1730 Rhode Island Avenue, Suite 512, Washington, D.C. 20036. The Council is an association of more than 100 public corporate and union pension funds, with more than $1 trillion in assets. I have been employed by the Council since January 1996. Prior to that I was employed for five years by the Investor Responsibility Research Center as Deputy Director of the Center's Corporate Governance Service.

3. On November 5, 1996, Jacob A. Goldberg of the law firm Spector & Roseman, P.C., called me at the Council of Institutional Investors to describe the Archer Daniels Midland Company derivative litigation. I discussed Council members' ongoing concerns about the independence of ADM's board of directors.

4. About a month later, Mr. Goldberg phoned to set up a meeting with the Council. In response to my request for a written summary of the lawsuit, he mailed a letter dated December 15, 1996 to the Council's offices. A true

and correct copy of this letter is attached hereto as Exh. A.

5. In this letter, Mr. Goldberg stressed that the firm was interested in meeting with the Council and Council members to discuss "the troublesome systemic problems plaguing the ADM Board of Directors." Exh. A at 1. A primary goal of plaintiffs' lawsuit, according to Mr. Goldberg, was to "recover for ADM as much of the wasted $190 million as is reasonably and realistically possible from the culpable officers and directors." *Id.* at 2. Equally important, he continued, were "the structural problems with ADM's board." *Id.* Goldberg stated that "any resolution of this case requires us to seek various fundamental changes to the ADM board, its structure and the way [it] governs ADM." *Id.*

6. On December 19, a Council staffer spoke with Mr. Goldberg and Robert M. Roseman of Spector & Roseman, P.C. The Council forwarded its Bill of Rights and definition of "independent" director to the law firm of Spector & Roseman, P.C.

7. That was the Council's last substantive conversation about the lawsuit with counsel for plaintiffs. On May 30, a reporter from the *Wall Street Journal* called me to discuss the proposed settlement. Shortly thereafter, on June 3, an irate individual shareholder faxed a copy of the proposed settlement to the Council.

8. I analyzed the proposed settlement and determined that it makes no meaningful improvement in ADM's corporate governance, and, in my opinion, is not in the best interest of ADM or its shareholders. Most importantly, the proposed settlement's definition of "outside" (or independent) director falls significantly short of the Council's definition. While purportedly modeled after the Council's standard, the proposed settlement's definition added undefined "materiality" hurdles to various categories of "outside" directors that falsely classify "inside" directors as "outside" directors.

9. I immedately contacted Mr. Roseman to explain the Council's concern with the proposed settlement definition and to clarify the impact of the materiality hurdles. In response to my criticism of the proposed definition, Mr. Roseman told me that ADM refused to accept the Council's more stringent definition of "outside" director. He explained that, under the Council's definition, the company would be forced to remove certain directors from its board.

10. I asked Mr. Roseman to provide a written analysis of ADM's board using the proposed definition. Mr. Roseman's response is attached hereto as Exh. B. According to Mr. Roseman's analysis, the only ADM directors who do not qualify as "outside" directors are company chairman Dwayne Andreas, CEO G. Allen Andreas and Shreve Archer, father of ADM's treasurer. All of the remaining 10 board members qualify as "outside" directors under the proposed settlement's definition, even though four directors—two attorneys whose law firms provide legal services to the company, and two executives of companies or their affiliates that do business with ADM—have ongoing business relationships with ADM and accordingly are beholden to management. These four directors do not qualify as independent "outside" directors under the Council's definition or any other generally accepted standard of true independence.

11. ADM has been a poster child for the corporate governance movement for years. The settlement of this derivative action offers an unprecedented opportunity to implement changes in ADM's bylaws that will benefit ADM and its shareholders. This opportunity should not be squandered.

12. I do not believe that the proposed settlement is fair, reasonable, adequate, or in the best interest of ADM and its shareholders. Indeed, I do not believe that the proposed settlement offers any significant benefit to ADM or its shareholders.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 2d day of July, 1997.

/s/ Ann L. Yerger
ANN L. YERGER

[Notarization and Exhibits Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

DECLARATION OF SARAH A.B. TESLIK

Sarah A.B. Teslik hereby declares pursuant to 28 U.S.C. § 1746:

1. I am over eighteen years of age and have personal knowledge of the matters stated herein.

2. I have been the Executive Director, attorney and principal staffer for the Council of Institutional Investors (the "Council") since its formation in 1985. The Council is a non-profit association of corporate, public and Taft-Hartley pension funds that addresses investment issues. Council members invest over a trillion dollars on behalf of millions of employees and beneficiaries. Objectors California Public Employees' Retirement System and the Florida State Board of Administration are members of the Council.

3. The Council is a very deliberate and cautious organization that only adopts policies on essentially unanimous votes, and only after careful research and discussion. The Council has adopted fewer than a dozen corporate governance policies in all of its years of existence. Each of these has been so basic that every one of the Council's corporate members has voted in favor of each of the policies put up to them for a vote, and most of the policies are standard operating procedure at most or many of the nation's largest companies.

4. The first and probably the most central of the Council's policies is its requirement that a majority of a corporation's directors be independent from potentially compromising financial, familial or professional relationships to the company. The Council defines independence for these purposes in a detailed definition which, in essence, defines a director as independent if his or her only non-trivial connection to the board is his or her board seat. Members adopted this definition after they agreed that a board was much less likely to perform properly its central function as an independent oversight body if most of its individual members were not, in fact, independent. Without this foundation policy, members felt most other corporate governance standards and procedures were meaningless. The policy and definition were adopted with unanimous votes on April 5, 1991. A copy of this policy is attached hereto as Exhibit "A".

5. The other central policy of the Council is its position on confidential voting. Directors, of course, are elected by shareholders, and so the election process is the vital link that provides meaningful accountability to shareholders. When this policy was debated, members agreed unanimously that this link is weakened, threatened, or shattered if those who run for office count their own ballots. That is an election practice that members did not believe would be tolerated in any other part of American life and should not be tolerated in corporate elections either.

6. The Council therefore on June 23, 1989 unanimously adopted a policy, attached hereto as Exhibit "B", supporting a confidential ballot—supporting the idea, in other words, that neutral third parties selected by the corporation should count shareholders' proxies. With increasing numbers of employee and institutional service provider shareholders who could suffer retribution if they dared to cast votes against management, members believed that this policy would only become more important over time.

7. The Council's majority standard for board independence is so universally accepted that it is the standard now used by nearly 85 percent (84.7 percent) of S&P 500 companies. Indeed Council data indicate that only 17 companies of the 483 member of the S&P 500 surveyed by the Council have fewer independent directors than ADM.

8. In the proposed settlement ADM offers an independence standard and definition that are, in my opinion (a) completely meaningless because of clever modifying language; (b) virtually identical to changes already proposed by the company more than a year ago, and without reference to the derivative lawsuit; (c) worse (less protective of shareholders) than the standards already in place at all but 15 percent of S&P 500 companies; and (d) so completely dated in language as to be archaic.

9. The proposed settlement provides that directors will be deemed to be "outside" even if they have personal, business, or professional ties to the company and/or its senior management, unless the relationship is deemed by the company to be "*material to the company or to the director.*" With a company the size of ADM, I cannot imagine a single relationship any one person could ever have, personal, professional, or otherwise, to ADM that would be material *to ADM*. This standard is therefore, in my opinion, a standard that virtually no director can fail. And yet it was Council members' belief that even the smallest of financial or personal relationships can genuinely affect a person's independence because of its potential to affect *the person.*

10. The company offers this can't-fail-to-be-met standard despite the fact that the widely accepted Council standard was already submitted to it by two of its largest shareholders, and two of the largest Council members—the California Public Employees' Retirement System and the Florida State Board of Administration—and received an exceptionally high endorsement of 41.6 percent of

voting shareholders at the company's October 17, 1996 annual meeting.

11. The offer in the proposed settlement that direct management representation on the board will be limited to no more than three seats was lifted almost verbatim from the *Governance Committee Report to the Board of Directors of Archer Daniels Midland Company* (Jan. 15, 1996), which is attached hereto as Exhibit "C". This Committee was established and acted prior to the filing of the lawsuit to which this proposed settlement is the proposed conclusion. The ADM board adopted all of the recommendations in the Report. *See* Exhibit "E". So shareholders gain nothing from this proposed settlement they did not already have. And they did not have anything innovtaive here in any event: according to Council data, this company suggestion is standard operating procedure at most S&P 500 companies anyway—86.5 percent have three or fewer executives on the board.

12. Similarly the concept of a "lead director" seems to me to be another essential repeat of a change already called for in the 1996 Report, with the renaming of the lead director as the vice chairman. A similar repackaging appears to have occurred with the the settlement's proposal to establish a governance committee to assess board and committee effectiveness. Under current board policies the nominating committee is responsible for annual director "self-assessment and board evaluation," while all nonmanagement directors handle the "establishment and performance criteria for evaluation of the CEO." As a result, the creation of this separate corporate goverance committee does not appear to represent any meaningful innovation from current company practice.

13. The proposed settlement's requirement that separate nominating, compensation and audit committees must be composed exclusively of outside directors was also lifted verbatim from the 1996 Report.

14. The proposed settlement does offer a version of confidential voting that was not contained in the Report. But it is, if anything, an even more meaningless provision, in my opinion, than the definition of independence used for directors. The proposed settlement indicates the company will grant shareholders confidential voting—but only, it seems, in those situations in which it is irrelevant —only in situations where there are no proxy contests or solicitations. In these situations the proposed settlement indicates there will *not* be confidential voting. And, although it seems nearly irrelevant under the circumstances, the company also does not indicate whether in those trivial and routine situations in which votes will be tallied confidentially, the confidentiality will last only until the polls are closed or whether it is permanent. Other companies with confidential voting policies generally, in the Council's experience, make this clear—it is a distinction that matters a great deal, especially to individual employee shareholders.

15. I have compared the governance provisions of the proposed settlement with the provisions already accepted by the board in the 1996 Report. This comparison is summarized in Exhibit "D" hereto. In my opinion, the few items in the settlement that cannot be found in the Report are trivial and provide no benefit to shareholders. On balance, the proposed settlement is no improvement over the governance provisions already accepted in the Report. I am unable, therefore, to identify new, positive, and meaningful corporate governance changes offered in the proposed settlement. This is particularly surprising and disappointing since I personally, numerous Council members individually, and other members of Council staff repeatedly made offers to ADM directors, consultants and other representatives to provide information on independent directors and other core member and Council policies that could have formed the basis of a very limited and conservative but meaningful set of governance principles.

16. Since the proposed governance provisions offer nothing significantly new, the proposed settlement provides no value to ADM or to its shareholders. However, a *truly* independent board could add significant value. A recent study by the McKinsey & Co. consulting firm found that 50 money managers representing $850 billion in assets were willing to pay an 11 percent "good governance" premium. A discussion of this study is attached hereto as Exhibit "F".

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 2d day of July, 1997.

/s/ Sarah A.B. Teslik
SARAH A.B. TESLIK

[Notarization and Exhibits A-E Omitted in Printing]

EXHIBIT F TO TESLIK DECLARATION

THE WALL STREET JOURNAL, MONDAY, JUNE 30, 1997

WHY INVESTORS PUSH FOR STRONG CORPORATE BOARDS

Manager's Journal
By Jennifer H. van Heeckeren

Trustees and staff of the California Public Employees' Retirement System are developing guidelines to grade companies in Calpers's portfolio on the independence of their boards. Calpers cannot be ignored: Its $80 billion in equities make it one of the nation's largest shareholders and a force to be reckoned with in the governance arena. A study I conducted with Diane Del Guercio at the University of Oregon shows that Calpers has the power to provoke significant change, such as takeover attempts, turnover, restructurings and asset sales.

CEOs would be wise to embrace the idea of strongly independent boards. For if investors can't get boards to work well, they may turn to other measures—sitting on boards themselves, lobbying for direct government regulation or supporting a return of corporate raiders.

The growing power and independence of boards reflects a reversal of a trend that dates to the early years of this century. A seminal event occurred in 1914, when representatives of J.P. Morgan resigned from 30 company boards in a single day. They and other institutional investors had held sway in boardrooms for more than two decades, leaving CEOs with little real decision-making power. But as they came under critical public and political scrutiny, they beat a hasty retreat. Family owners were also losing influence, as founders aged and ownership tilted toward outsiders. So a new group of professional CEOs, bred in new management schools, took the reins of corporate America.

Their grip loosened in the 1950s, when an economic boom drove a wave of investors into stocks. Increased individual ownership heightened expectations and fed a belief in shareholder democracy. New regulations requiring the disclosure of senior-management pay, along with the rise of the corporate raider, spurred a growing number of contested elections for boards, known as proxy contests. After a concerted lobbying and publicity effort on governance issues by the Business Roundtable, new regulations in 1956 clamped down on proxy battles, and CEOs prevailed at the end of the decade.

Today institutional investment is again booming. After declining to as low as 15% in the 1940s, institutional ownership returned to turn-of-the-century levels of 50% and higher in the mid-1980s. Takeovers flourished in the '80s environment of few regulatory restrictions and easy financing via junk bonds. But public opinion turned against raiders, state regulations and court decisions made takeovers more difficult, junk bonds dried up, and management created innovative takeover defenses. Many CEOs believed they had won the governance battle.

CEOs who resist pressure for strong governance risk having Calpers or regulatory bureaucrats tell them what kind of board they should have.

But institutional investors looked for other ways to prod CEOs. In 1992 the Securities and Exchange Commission made it easier for investors to coordinate on governance issues. Shareholders issued "hit lists" of underperforming companies, announced shareholder proposals and communicated directly with management. But it didn't make sense for Calpers and other institutions to intervene in each of the thousands of companies whose

stock they held. They have turned to boards—shareholders' elected representatives—as management watchdogs.

What do these investors want? The bottom line is long-term returns. The most active investors are pension funds with mind-boggling obligations. Calpers will need to be able to pay out $30 billion each year to its beneficiaries by 2020. Institutional investors rely on strong, independent boards to create shareholder value. They believe strong boards will help companies correct mistakes, recover from crises, and find, support and reward outstanding CEOs.

Numerous recent examples, along with academic research, support the notion that boards can have a significant impact on stock prices. Recent research by McKinsey in conjunction with Institutional Investor found that many large private money managers—especially those looking for long term value—are willing to pay a higher stock price for companies with good, independent board governance. We surveyed 50 money managers representing about $850 billion in assets, and found that they were willing to pay an 11% good-governance premium on average.

How should CEOs respond to the demand for strong, independent boards? Well-performing companies have the option of doing nothing for now—but only until there is a period of poor results, a complex acquisition, or a crisis. CEOs could search for ways to thwart investors, as they did in the 1980s. But underlying forces make this strategy unpromising. Institutional ownership will probably continue to increase. Public opinion is suspicious of CEOs, whose pay has dramatically increased while companies downsized. The most prominent investors, meanwhile, are more sympathetic—not the "greedy raiders" of the '80s, but institutions like Calpers, which pays the pensions of firemen, police officers and school librarians. Politicians aren't likely to attack these investors on behalf of CEOs.

Finally, the SEC has been embracing a pro-shareholder stance that seems unlikely to change.

CEOs can benefit personally from strong, independent boards. As major stockholders themselves, they should pursue strategies that increase the stock price. Harmonious relations with investors enable CEOs to focus their time and energy on substantive business issues. CEOs will find, too, that investors are much more patient and understanding in bad times if they trust the board. And while a weak board may rubber-stamp the CEO's decisions when times are good, often its first response to a crisis is to fire the CEO—whereas a strong board with substantive knowledge of strategy and company performance will tend to support management.

CEOs who resist pressure for strong governance risk having Calpers or regulatory bureaucrats tell them what kind of board they should have—an outcome that serves no one's interest. After all, the best boards aren't built by outsiders. Only the CEO has the knowledge and the position to build the optimal board for his company. Rather than fight the tides, CEOs should take the lead by tailoring strong boards for their companies, and thereby shape the next era of corporate governance to their—and their shareholders'—benefit.

Ms. van Heeckeren is a consultant in McKinsey & Co.'s Cleveland Office. Robert Felton, a McKinsey partner, contributed to this article.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

DECLARATION OF JOHN C. COFFEE, JR.

JOHN C. COFFEE, JR., declares as follows:

1. I make this declaration to supplement my earlier affidavit dated June 25, 1997, and earlier filed in this proceeding. I do so in response to the letter, dated June 30, 1997, from James E. Burton, Chief Executive Officer of California Public Employees' Retirement System ("CALPERS") to G. Allen Andreas, Jr. Chief Executive Officer and President of Archer Daniels Midland ("ADM").

2. In that letter, Mr. Burton voices several criticisms of the settlement, including, most notably, the criticism that the definition of "outside" and "nonmanagement" directors in the proposed settlement is "inadequate", because it is subject to an undefined materiality standard. In this affidavit, I address only his criticism of the "materiality" exception.

3. As an abstract matter, I believe Mr. Burton is correct; that is, a definition that disqualified a director from being an independent "outside" director if such director, directly or indirectly, had any business or financial relationship with the company would be superior. A materiality standard can raise difficult interpretive issues (although precisely for this reason it may be difficult for a ADM to rely on such a materiality standard with any confidence). At the same time, however, I also recognize that

there are problems with the elimination of a materiality standard. For example, sometimes there are unknown *de minimis* relationships (such as where a law firm handles a minor matter for a subsidiary of the parent corporation on whose board one of its partners sits—without anyone recognizing the parent/subsidiary relationship). If a director were deemed not to be "independent" because of such a *de minimis* and unknown relationship, the definition of independence would sweep overbroadly.

4. While I would personally prefer the Council of Institutional Investors' definition, I do not believe that it reflects the prevailing approach today among large public corporations. Indeed, many public corporations with model corporate governance standards have not adopted this standard.

5. In that light, I understand and sympathize with Mr. Burton's criticism, but it does not cause me to alter my original judgment that ADM's new corporate governance provisions reflect the "state of the art" today.

6. I declare under the penalty of perjury that the foregoing is true and correct and that this Declaration is executed this 3rd day of July, 1997.

/s/ John C. Coffee, Jr.
JOHN C. COFFEE, JR.

Dated: July 3, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

DECLARATION OF ROBERT M. ROSEMAN IN OPPOSITION TO OBJECTORS' MOTION TO POSTPONE THE SETTLEMENT HEARING

I, Robert M. Roseman declare as follows:

1. I am a partner in the firm Spector & Roseman, P.C. and am counsel for plaintiffs in this action. I submit this declaration in response to California Public Employees' Retirement System ("CalPERS") and Florida State Board of Administration's ("FSBA") hereinafter referred to as the "Objectors") request that this Court postpone the hearing because the Objectors did not receive adequate notice of the Settlement.

2. Beginning in December 1996, my co-counsel, Terry Rose Saunders, and I contacted and met with a number of Archer Daniels Midland Company's ("ADM") institutional investors to solicit their view on and keep them appraised of the terms of a proposed settlement with ADM. Initially, based on comments made by Sarah Teslik, Chairperson of the Council of Institutional Investors ("CII"), I asked my associate, Jacob A. Goldberg, to contact Ms. Teslik to solicit her views.

3. When Mr. Goldberg attempted to speak with Ms. Teslik at the CII, he spoke with Ann Yerger who told Mr. Goldberg that there was no need to speak with Ms. Teslik. Ms. Yerger told Mr. Goldberg to draft and send

a letter to her describing the case and enclosing a copy of the Complaint.

4. In mid-December, Mr. Goldberg wrote to Ms. Yerger to inform her of the nature and status of the action, to send her a copy of the Complaint and to set up a meeting with her. Ms. Yerger then arranged for a meeting among Mr. Goldberg and me with Anne Hanson, a staff-person at the CII.

5. Mr. Goldberg and I had a telephone conversation with Ms. Hanson on December 19, 1996. Ms. Hansen informed us that the CII rarely involved itself in a legal action. She said that such actions were politically sensitive and that members of CII did not always agree on outcomes and solutions or with shareholder activism in general. Ms. Hanson told us that we should speak to CII's members on an individual basis. Ms. Hanson gave us the names of several CII members to contact who she believed would agree to meet with us concerning the corporate governance at ADM.

6. Additionally, during that meeting, we agreed to draft a synopsis of the derivative claims and discuss the then pending motion to dismiss for CII's "Membership Alert" news letter which Mr. Goldberg did.

7. At no time in our conversation with Ms. Hanson did she request that we keep her or CII informed of our settlement discussions or offer us assistance beyond sending us standard membership documents, including the CII definition of independence, and providing us with the names and telephone numbers of certain of her members whom she believed would be willing to meet with us.

8. Shortly after the conversation with Ms. Hanson, I met with Ed Durkin of the Carpenters' Union Pension Fund, one of ADM's largest shareholders and a member of CII. This fund had been one of the groups responsible for sponsoring a resolution concerning independence

of ADM Directors for shareholder approval at ADM's 1996 annual shareholder meeting. During this meeting, I told Mr. Durkin that it was our intent in negotiating any settlement with ADM to take into consideration ADM's institutional investors' concerns with regard to, among other things, the definition of an independent director and the need for confidential voting. I also told Mr. Durkin that we intended to meet with as many of ADM's largest shareholders to solicit their views and to let them know what we believe we can achieve in a negotiated settlement. Mr. Durkin expressed his views and provided us with names of individuals at other investor funds to contact. I also told Mr. Durkin that we would remain in contact with him and if at any time he wanted to speak with us we would be available.

9. On February 6. 1997, my co-counsel Terry Rose Saunders and I met with Kayla Gillan, general counsel of objector CalPERS, in San Francisco. We explained to Ms. Gillan the status of the litigation and settlement discussions and, in particular, discussions we had had with ADM regarding the definition of "independence", for ADM's Board of Directors. We spent approximately one and one half hours with Ms. Gillan primarily discussing our settlement negotiations with ADM.

10. We specifically advised Ms. Gillan that ADM was unwilling to adopt all of the provisions of the CII definition of independence. Ms. Gillan responded that she understood that and that a somewhat weaker definition of board-member "independence" than that of CII was "okay" because CII's definition was intended to establish a starting point for negotiations.

11. We told Ms. Gillan we could not say if and when we would conclude settlement negotiations with ADM. Ms. Gillan advised us that CalPERS might resubmit the proposal it had made in 1996 concerning the definition

of independence. We responded that we had no problem with CalPERS proceeding with a proxy proposal.

12. Ms. Gillan said that she would report our conversation to FSBA. She suggested that we meet with John Lukomnick of the New York City Pension Fund and Bart Naylor of the Teamsters Pension Fund, which we did. She commended us for taking the time to inform the institutional investors of our settlement discussions. Ms. Gillan also told us that she would forward to us names of other institutional investors with whom we might wish to meet concerning the settlement discussions. We never heard from Ms. Gillan or anyone else from CalPERS until June 30, 1997, when I received a copy of a letter to Allen Andreas from Mr. Burton of CalPERS. In fact, the week after this Court preliminarily approved the settlement, I contacted Ms. Gillan to discuss the settlement with her and to answer any questions she may have. I left a detailed message on her voice mail when informed that she was not available. She never called me back despite my attempting to contact her several times thereafter.

13. Following the preliminary approval I called each of the individuals with whom we met during the litigation to discuss the terms of the Settlement. I spoke to Bart Naylor of the Teamsters and Ed Durkin on a number of occasions.

14. Shortly after this Court's preliminary approval of the Settlement, Ms. Yerger requested a description of the current Board of ADM and who among that list ADM considered to be independent. Ms. Yerger was aware of the terms of the Settlement and questioned me about it. This conversation took place more than *one month ago*. Ms. Yerger asked me to explain the reason why ADM did not accept the CII definition. I tried to explain to her that ADM considered CII's restrictive definition to be inconsistent with the Board's right to exercise its judg-

ment in determining whether a professional, business or consulting relationship was sufficient to cause a director not to be independent. By way of example I told her that certain directors would not be independent under CII's definition because their company received monies from ADM which admittedly were not material to their company. I next spoke to Ann Yerger on June 27, 1997 when she requested copies of the papers we had filed with the Court in May 1997 in support of preliminary approval of the Settlement. I also sent her copies of the affidavits of John C. Coffee, Jr and R. Alan Miller, plaintiffs' experts.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed this 3rd

/s/ Robert M. Roseman
ROBERT M. ROSEMAN

Dated: July 6, 1997

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

[Caption Omitted in Printing]

REPORT OF PROCEEDINGS

July 7th, 1997
Fairness Hearing
Before: HAROLD A. BAKER, Judge Presiding

* * * *

[2] THE CLERK: Paul Felzen et al. v. Dwayne O. Andreas, et al., 95-2279.

THE COURT: State your appearance for the plaintiffs.

MR. PHEBUS: Joseph Phebus.

MS. SAUNDERS: Good morning, Your Honor. Terry Rose Saunders.

MR. ROSEMAN: Good morning, Your Honor. Robert Roseman.

MR. HARWOOD: Good morning, Your Honor. Robert Harwood for the Delaware plaintiffs.

MR. BERNSTEIN: Good morning, Your Honor. Stanley Bernstein, for the Delaware plaintiffs.

MS. SALVETTI: Good morning, Your Honor. Susan Salvetti, for the Delaware plaintiffs.

THE COURT: For ADM.

MR. SHAFTER: Good morning, Your Honor, Jim Shafter.

MR. PECKERT: Jim Peckert.

THE COURT: Now, there are a number of objectors.

MR. MOSS: Your Honor, if I could state for the record, I am Thom Moss for the individual defendants.

THE COURT: Did I miss anybody else among the plaintiffs/defendants?

MR. DOCKTERMAN: Your Honor, I am Michael [3] Dockterman. I represent one of the additional defendants as an additional appearance filed this morning on behalf of Mr. Webb.

THE COURT: And I am sorry, Mr. Moss. I couldn't see you. All right. Now the objectors. Why don't you come up and sit in the jury box where you will be close and have a ring-side seat so to speak.

THE COURT: Very well. Mr. Dessen, how are you this morning.

MR. DESSON: Very good, sir.

MR. HANSEN: Good morning, I am Mark Hansen representing the Florida State Board of Administration.

MR. BEENCK: Good morning, Your Honor, I am Tom Beenck, I am the assistant general counsel for the Florida State Board.

MR. GLOTZER: I will introduce myself. Good morning. My name is Michael Glotzer, shareholder activist. I lay claim to being the voice of over 25 percent of the shareholders of this company limited to the subject of cumulative voting. 25 percent voted for our proposal at last year's annual meeting, so I lay claim being the spokesman. If they voted for my proposal, they certainly authorized me to speak on their behalf.

THE COURT: I saw that assertion in the materials. Again, do you want to state your appearance [4] for the record.

MR. HANSEN: Thank you, Your Honor. Good morning. My name is Mark Hansen from the Kellogg, Huber, Hansen, Todd & Evans, from Washington, and I represent here today the Florida State Board of Administration as an objector as to this proposed settlement, and the California Public Employees' Retirement System as an objector; and with me is Tom Beenck, the general counsel of the Florida State Board of Administration.

THE COURT: I don't know if you are all admitted to practice, but I will admit you *pro hac vice*.

MR. HANSEN: Thank you, Your Honor.

THE COURT: Now, do you have an interest? The people in the audience.

MS. SAUNDERS: Well, Your Honor, Mr. Miller is attending today. Mr. Miller submitted an affidavit.

THE COURT: I read his submissions, yes.

MS. SAUNDERS: He is here this morning, Your Honor, in the event that Your Honor has any questions or needs any testimony.

THE COURT: Thank you. All right. Now, the first question I gather—where is the docket sheet, Marilyn? Here I have got it. Thanks.

Is that there is a motion, I gather, by the objectors to postpone or vacate this hearing and set it for [5] another day. I will hear argument.

MR. HANSEN: Thank you, Your Honor. Shall I address the court from here?

THE COURT: Yes, you may.

MR. HANSEN: Your Honor, I represent, as I mentioned earlier, the California Public Employees' Retirement System and the Florida State Board Administration, CALPERS, as the acronym goes, has 2.7 million of ADM shares, Florida SBA has 1.7 million shares.

Your Honor, this hearing was set on May 30th upon request of the plaintiffs' counsel. It's now just—we're a month later. Through various machinations, my clients didn't really become aware of the paper regarding the settlement until about two weeks ago; and, as a result, Your Honor, given the fact that this settlement we believe is really beyond the bounds of proper settlement, we would like to raise a very strong objection to it, but, we believe, we have been hampered by the speed of which this hearing has been convened.

We have submitted an objection. We are prepared to object here today, but, we believe, Your Honor, you would have far more objectors if the hearing were postponed at least a month and we would be able to come in with more testimony to rebut the rather scarce testi

mony that is here in support of the settlement, that being Mr. Miller's [6] declarations and Mr. Coffee's declaration.

We think, Your Honor, that given the promptness of this case, given the—what we consider to be the improper terms of the settlement, we think there is no prejudice to anybody in delaying this a month so that all shareholders can be heard so we can make full and reasonable representation to the court, including testimony and other witnesses we think would support our position.

THE COURT: All right. Anybody else want to be heard in support of the motion? All right. In opposition, if you wish, you can address the court from your chair.

MS. SAUNDERS: Perhaps to save time, Your Honor, I can stand here. Terry Rose Saunders on behalf of the plaintiffs. Your Honor, we submitted this morning a declaration from Mr. Roseman which I have set—

THE COURT: I have read it.

MS. SAUNDERS: Fine.

THE COURT: I also read Professor Coffee's statement.

MS. SAUNDERS: Fine. Professor Coffee's statement goes to the merits. Mr. Roseman really goes to this motion. Your Honor, there is no reason to postpone this hearing. The investors in this company, the shareholders received notice shortly after May 30th. The [7] objector has not submitted any real evidence that they did not receive notice. In fact, the one declaration that they have submitted of Miss Yerger states that she received the settlement papers on June 3rd. That is more than a month ago.

Since this settlement was approved, we have been in touch with many institutional investors and representatives all of them are aware of this settlement.

As Your Honor knows, the problem you are aware there was great press coverage of the court's order on May 30th of the preliminary approval, and there is just

no reason that anyone could not have been properly prepared to appear this morning for this hearing.

In addition, while CalPERS and the Florida State Board are large institutional shareholders, they represent less than one percent of the shareholders or the shares of ADM. ADM has over 530 million shares outstanding. They are the only ones to come in this morning to, and seek to delay this hearing; and, again, I emphasize we have talked to other large institutional shareholders who were perfectly aware of this.

I would point out, Your Honor, it's in Mr. Roseman's declaration that he did attempt to contact CalPERS through Miss Gillan, (phonetic) who is their general counsel. Left a detailed message and she never [&] returned the call.

In addition to that, CalPERS and the Council of Institutional Investors who seems to be supporting this motion have been aware of the settlement discussions since last December. We had a meeting with Miss Gillan. I attended that meeting in February. The specific point about which they are objecting this morning was discussed at that meeting and we never heard from them again.

This case has been—we have been trying to get this settlement approved. We would like—we have Your Honor's attention this morning. Everybody is prepared. Everybody is here. And the hearing should go forward. There will be no prejudice to the objectors. There will be prejudice to the shareholders of ADM if the hearing does not go forward.

THE COURT: Anyone else want to speak? On behalf of the Delaware.

MR. HARWOOD: Thank you, Your Honor. I will try not to repeat any of Miss Saunders' argument. I would note I think there was a rather long article on the settlement which appeared in the June 2nd edition. I believe it was June 2nd edition of the Wall Street Journal and explained some of the terms, so CalPERS and

the other institutional investors were arguably on notice of that, at least since June 2nd and from the affidavits that have been submitted [9] the Institutional Investors knew that a settlement was in the works well before that.

I would also note that Institutional Investors and specifically CalPERS knows how to come in and make itself known when it wants to. It has done it in a litigation pending in the Supreme Court of New York County *In Re: W.R. Grace* where CalPERS saw fit to bring on an order to show cause to make itself either sole or an additional co-lead counsel. They know how to do it when they want to, judge.

And, fiinally, I don't know what machinations Mr. Hansen was referring to, but I know from my involvement that everything about the hearing was excruciatingly above board, and if that machinations were directed at either counsel or plaintiffs or the defendants or, indeed, the court, I think Mr. Hansen should explain himself.

MR. HANSEN: I make no assertion of any impropriety, Your Honor, but I do say coming in here after doing nothing in the case for years and having a 30-day window with this kind of what we consider outrageous settlement is far too short, judge. Far too short.

THE COURT: Why do you say they have done nothing?

MR. HANSEN: The case hasn't been litigated to a motion to dismiss. The case hasn't had real discovery. There hasn't been a single deposition taken. I have [10] studied the materials they have submitted. Again, I haven't seen the affidavit that has the backup for the fee petition.

I have seen Miss Saunders' cover affidavit, but, Your Honor, all I can see evidence of in terms of the prosecution of this case is the filing of the complaint, a dismissal without prejudice, a refiling of the complaint, dis-

covery granted only to the extent of some release of some documents that have been provided to the government.

Request for discovery stonewalled. Motion to compel, adjourned seven times. Settlement? After a period of more than a year.

And then suddenly we have thirty days to have this extraordinary settlement crammed down on the shareholders. The only shareholders we have here before the court, Your Honor, are sitting here in this box, and we don't think that's an appropriate length of time for this process to take place.

There is no reason why this had to be thirty days. I think frankly, Your Honor, that it was done in an expedited way to try and get this settlement through and to eliminate the ability of CalPERs, SBA, and the individual shareholders are here to make their full presentation to the court, and I can't see any reason, and I haven't heard it in their presentation, why this couldn't be a more [11] reasonable period.

I would note at the annual meeting of this company almost half of the shareholders, over board opposition, loaded in favor of the proposal submitted by some of the international shareholders.

There is a lot of feeling out there among the shareholders of this company about these issues, and we think, Your Honor, if there were more time this court would have a fuller record.

Your Honor, under the cases that we have cited to the court a full record is what this process is about. Objectors should be permitted a full opportunity to make a record to the court so that the court can appropriately assess its fiduciary role, which you have here, Your Honor, because you have to determine this settlement is fair to the shareholders.

Plaintiffs' lawyers have their interest, the company has its interest, the individual directors have their interest, but, Your Honor, as their own expert Mr. Coffee pointed out, derivative actions has a unique potential for collu-

sion for settlements not in the best interest of the shareholders. We think that is what has happened here.

We see no reason why, we haven't heard any reason why a reasonable period couldn't be provided so this court [12] can have a full record.

Your Honor, I have been retained no more than about ten days. I need more time to present that full record to the court. I believe that the court should adjourn this hearing. We'll have a very full record and there may be many shareholders filling this box. It's just too short a time to have a full presentation.

THE COURT: Is Miss Saunders right that your client's general counsel has been in conference, consultation, contact with the plaintiffs during the negotiated, the extensive settlement negotiations that have been going on in the case?

MR. HANSEN: Your Honor, that's precisely our point that we would love to give a full record on. We have, indeed been, in contact in dealing with plaintiffs' lawyers what a fair settlement could look like and an out product of that there were concerns that were not addressed that the settlement was, in our judgment, completely different from what we said in a decent settlement, and, in fact, the settlement is nothing more than a (unintelligible) of principles. I hate to get into the merits.

THE COURT: They didn't agree with you in summary.

MR. HANSEN: I am sorry.

[13] THE COURT: I say they didn't agree with you.

MR. HANSEN: They didn't negotiate.

THE COURT: With your clients, they didn't agree with your clients.

MR. HANSEN: They didn't pick up a phone and make phone calls. Our product wasn't productive from our standpoint, and also I think it's important to note that one of the crime (unintelligible) what they are having the court approve is that somehow they have gained the

confidence and the assent of the large institutional shareholders, if that is something that we're supporting the settlement. In fact, it's quite the contrary.

When the institutional shareholders learned what had been done, particularly, when the institutional shareholders learned what the settlement really was going to involve, that is nothing, a large payment to the lawyers and only purely cosmetic alterations of principles of the governance that has already been agreed to, Your Honor, already been agreed to by the ADM Board, the shareholders, I believe would be outraged would not be too strong a word. CalPERS and SBA has rushed here to the court to make that position known to the court.

We believe others will follow, but the time is very short. To say that because they picked up the phone we are somehow parties to the settlement, I think is [14] exactly the opposite of the truth, Your Honor. They did pick up the phone. All the more reason why they should not have entered into this what we considered an illusive settlement that benefits the lawyers and not benefit the company or its shareholders at all. So we don't believe, Your Honor, in fact, that there was conversation.

THE COURT: I thought you weren't accusing them of wrongdoing. I heard the word collusive and I have heard quite a few pejorative words.

MR. HANSEN: They are indeed pejorative. Wrongdoing. That's in the eye of the beholder. The plaintiffs have an interest here. They have a large fee petition before the court. Certainly the individual defendants have an interest here.

Frankly, I have no quarrel with the plaintiffs' lawyer getting a fair fee, and I have no quarrel with defense lawyers trying to get their clients released. Who is here for the shareholders, Your Honor? The only people here for the shareholders, and the only people who have an interest that be protected are the Institutional Investors shareholders before the court and the individual shareholders in this box.

We feel railroaded, Your Honor. We feel the shareholders—does not serve the shareholders interest, and we believe a fair presentation would prove that to the [15] court. I am not here to sling mud, Your Honor.

I do believe a settlement of a claim of $190 million worth of wrongdoing admitted by Archer Daniels Midland that legally represents only payment for lawyers, and that's in two parts, and these lawyers and an independent director committee of lawyers, and then the beauty of the settlement, Your Honor, the governance approved this.

Your Honor, I do believe that something slightly suspect in the presentation of the court about this supposed jewel talking about governance improvements, the majority of which, all of which were approved in January of 1997 by the board. Your Honor, there is something wrong with this process.

THE COURT: Coffee and Miller don't agree with you.

MR. HANSEN: Coffee and Miller do agree with you. I will speak for Coffee. Let me take Coffee's affidavit and hand it up to the court this morning. I think that's a good point. Coffee says the standards—

(Interrupted by the court reporter.)

THE COURT: You must go to a court where if he doesn't speak rapidly, he won't be heard and the trap door will open and you will disappear. Slow down.

MR. HANSEN: Your Honor, I apologize. The Second [16] Circuit did tell me about a trap door. That does explain some of my speed. Mr. Coffee, Your Honor.

THE COURT: I know what you mean. He says that he agrees that it will just be heaven if you could have the kind of governance you talk about, but he says it doesn't meet reality and that most corporations reject flatly that approach.

I think I have heard enough rebuttal unless you have some jewel you want to depart. The bobbing up and down of the other lawyers in the case, they are dying to say something, too. Mr. Shafter.

MR. SHAFTER: Your Honor, may it please the court. Counsel has given an eloquent argument on the merits of his objection. Your Honor, I do sympathize with counsel when counsel is retained late in the game. That has happened to all of us as attorneys.

But the fact that the clients knew about the settlement as set forth in Mr. Roseman's declaration it's just absolutely the case. They did know. They are here today objecting because they thing they could have done better.

Your Honor, Miss Saunders misspoke to the court when, or misstated to the court when she said that these two institutions represented one percent of the shares of ADM. All of the objectors that have filed with the court [17] whether they are proper objections or not, all of them that are on file are less than one percent.

Ninety percent have not spoken in any way. But, as the court well knows, as in most cases, what that probably indicates. Also when counsel tells you that he represents two of the more important Institutional Investors, we absolutely agree with that. ADM is proud to have SBA and CalPERS as institutional shareholders.

But, judge, as Florida and CalPERS knows we have 365 other Institutional Investors all of whom are substantial. The company doesn't even follow those institutions unless they have lots of stock in excess of 75 to 100,000 shares.

So the fact that less than one percent is here today objecting and only two of the 367 Institutional Investors that we have here objecting is important.

Now for the reason to go forward is that, as the court is aware, ADM has a quarterly board meeting on July the 17th at which time, if this settlement is approved, the board will implement those changes not mandated but ordered by this court.

There are also changes in the therapeutics that require the board to take certain action at the shareholders meeting in October, and the changes that we are going to make are not changes in principle, they are [18] going

to be ordered by this court and we are changing our bylaws and our annual meeting is in October. And we have to tell our shareholders about those things.

We have to get the proxies out and that was the date this hearing was selected. Mr. Hansen is probably not aware that primarily practicing in Washington, D.C., but Mr. Phebus, Mr. Moss, and I know that the court does not sit regularly here in Urbana during the summer months and the court specifically set this hearing today while the court was here.

Judge, it is very important that this go forward. As the court has on file today our affidavit of mailing. There has been in excess of 200,000 first class notices sent out. People got notices. If they wanted to object, they are here. These are very sophisticated investors and they have obviously excellent legal representation here today.

The court should summarily deny the request for a continuance if for no other reason simply because you don't address a federal court by letter. You do it in a motion. The Seventh Circuit has spoken on that a number of times. This court has spoken on that a number of times. I would ask the court to call the matter for hearing on the merits.

THE COURT: Anybody else on behalf of the plaintiffs? I will come back to you. You will be heard [19] in full.

MR. ROSEMAN: Robert Roseman, Your Honor, as the point person for plaintiffs, my name is on the notice and I did receive a substantial amount of phone calls from shareholders, in excess of fifty, and by and large they were asking questions about do I submit a claim form, thinking that this was a class action.

But from those fifty shareholders I did not receive any indication that they were going to object. In fact, we were complimented on the settlement. I did speak, in addition to trying to speak to CalPERS, I did speak to the CalPERS Pension Fund. The Teamsters spoke to people whom we met with early on and they were basically

pleased with the settlement, although they would like to see things differently.

Of the information we received how can you object to something which is positive? And having met with those institutions and having spoken with them after the settlement was approved, they certainly had the opportunity to object and they chose not to.

THE COURT: Thank you, counsel.

MR. GLOTZER: My name is Martin Glotzer of Chicago. I believe, judge, you acknowledged the fact that I made the statement that I am a spokesman for shareholders only twenty-five percent of the company shares limited to [20] cumulative voting, and I would like that part of the record. The lawyers for the plaintiffs say there was only a few shareholders. Twenty-five percent of the shareholders are represented by me. I am their voice.

THE COURT: I recognize that that is your assertion. I saw that in the materials that I looked through in the past three days. That is your assertion. I didn't say I agreed with you.

* * * *

[79] THE COURT: All right. The court's ready to rule. Having heard the remarks of the proponents of the settlement and the remarks of those in opposition, the court concludes that the settlement, which is before the court is fair, reasonable, and adequate. The court considers the strength of the plaintiffs' claims in the case as balanced against what was obtained in the settlement.

[80] The case the plaintiffs had was not, as one of my colleagues described, "another case as a dead bang winner." Far from it. There were serious questions raised in the motion to dismiss, and I tried to look back through the record to see what discovery wasn't afforded and I think that pool of documents was available, and I can remember discussions with counsel in this case and in the other civil ADM cases that were pending about the availability of the document pool that had been created by

Judges, Shadur, Mihm, and I don't know about the judge in California participating in that, but I believe all of that information was available to the plaintiffs in the case.

So that the record really is slightly misleading as far as discovery is concerned because the plaintiffs did have all of that information available to them.

In addition, the parties, as you see from the docket, got to the point where they were squabbling about compelling discovery and having a hearing on the motion to dismiss, and the defendants kept asking to advance the hearing on the motion to dismiss, and then they began negotiaitons in the case and the court abstained from hearing or ruling on the motion at the request of the parties so that they could talk to each other.

Well, because lawyers talk to each other doesn't mean that the lawyers are in collusion. Far from it. Of [81] course, quite obviously they have to communicate and talk if they are going to find some alternative means of settling their disputes other than going to judgment in a court of law.

The defendants' ability to pay. There is a ten million dollar cap on the insurance. Mr. Hansen suggests that the directors had deep pockets. I have been in the legal profession and the litigation end of it for over forty years, I am sorry to say, and I wonder if he has ever tried to pursue a suit for transferring assets in fraud of creditors. That needs a good deal of luck.

And to assume that those directors are holding all of their assets, I think is an unwarranted assumption, so that the ten million dollars is a realistic sum to think was available; at least it was readily available—obviously available.

The complexity, length, and expense of further litigation also has to be considered. This case would have gone on for years. I wouldn't have had to suffer through it, being a senior judge somebody else could have taken it over, but my guess would be five years of further litigation.

The amount of opposition to the settlement. That's been commented upon by the proponents of the settlement. While the objections I am sure are heartfelt [82] and sincere, they really represent a very very small percentage of the shareholders of the corporation. The Not that the objections aren't to be discounted just because they are small—from a small number, relatively small number of shareholders, but still the overwhelming reaction to the proposed settlement has been acceptance.

I had no idea Edward Dessen was going to appear. I have known him for years. He is a businessman. He owns property. He is a very outspoken person, and, true, with faint praise, he approved the settlement. He may be reflective of the way a large percentage of shareholders feel. Well, it's a start. It's a beginning.

I find no basis for claims of collusion. Just none. These people have dealt with each other professionally and at arm's length as far as the progress of the case has been concerned.

Certainly competent counsel with experience has expressed support for the settlement. I have to respect that. And I have already spoken a little bit about the stage of the proceedings and the amount of discovery. The case has gone on for two years. A great deal—a substantial portion of which has been devoted to attempting to finding an alternative to the settlement of the dispute.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

Case No. 95-2279

Honorable Harold A. Baker
Judge Presiding

PAUL FELZEN, TRUSTEE OF LOUISE LASKIN TRUST—1991 and SANDRA ESNER,
Plaintiffs,

v.

DWAYNE O. ANDREAS, *et al.*,
Defendants,

and

ARCHER DANIELS MIDLAND COMPANY,
a Delaware Corporation,
Nominal Defendant.

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Consolidated C.A. No. 14403

IN RE: ARCHER DANIELS MIDLAND COMPANY

NOTICE OF APPEAL BY CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM AND FLORIDA STATE BOARD OF ADMINISTRATION

Notice is hereby given that Objectors California Public Employees' Retirement System ("CalPERS") and Florida State Board of Administration ("SBA"), each of whom is entitled to appeal from the Final Judgment and Order of Dismissal (July 7, 1997), and Order Awarding Attorneys' Fees and Reimbursement of Expenses (July 7, 1997), hereby appeal from such Judgment and Order to the United States Court of Appeals for the Seventh Circuit.

A joint appeal is practicable because, as is described in CalPERS and SBA's joint Objections to the Settlement (July 3, 1997), CalPERS and SBA's interests are aligned.

Respectfully submitted,

/s/ Mark C. Hansen
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Attorneys for
California Public Employees' Retirement Systems, Inc. and the Florida State Board of Administration

Dated: July 14, 1997

[Filed Aug. 15, 1997]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Caption Omitted in Printing]

PLAINTIFFS' MOTION TO DISMISS THE APPEAL OF NON-PARTIES

Plaintiffs-Appellees Paul Felzen, Trustee of Louise Laskin Trust—1991 and Sandra Esner ("Plaintiffs") move this Court for an Order dismissing the joint appeal filed by California Public Employees Retirement System ("CalPERS") and Florida State Board of Administration ("SBA") for the reason that, under the established law of this Circuit as recently reaffirmed in *In re: Brand Name Prescription Drugs Antitrust Litigation*, 115 F.3d 456 (7th Cir. 1997), as amended at 1997 U.S. App. LEXIS 12628 at *3, CalPERS and SBA have no right to appeal. CalPERS and SBA are not parties to the derivative action in which the Judgment and Order they seek to appeal were entered, and neither CalPERS nor SBA sought to intervene in the district court. Plaintiffs submit their memorandum of law in further support of this motion.

WHEREFORE, plaintiffs request that the appeal be dismissed.

Respectfully submitted,

By: /s/ Terry Rose Saunders
One of the Attorneys for Plaintiffs-Appellees
Paul Felzen, Trustee of Louise Laskin Trust
—1991 and Sandra Esner

[Counsel Listing Omitted]

SUPREME COURT OF THE UNITED STATES

No. 97-1732

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, *et al.*,
Petitioners

v.

PAUL FELZEN, *et al.*

ORDER ALLOWING CERTIORARI

Filed September 29, 1998

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted limited to Question 1 presented by the petition. The brief of the petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. Rule 29.2 does not apply. Justice O'Connor took no part in the consideration or decision of this petition.

September 29, 1998